ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Criminal Jury Trials: Challenge for Cause Procedures

Consultation Memorandum No. 12.20

April, 2007

Deadline for Comments: June 30, 2007

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ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a multi-year project which has undertaken a major review of the *Alberta Rules of Court* with a view to producing recommendations for a new set of rules. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This Consultation Memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Rules Project Criminal Rules Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

The Honourable Justice Ronald L. Berger, Court of Appeal of Alberta
The Honourable Justice Elizabeth A. Hughes, Court of Queen's Bench of Alberta
The Honourable Judge Michael G. Allen, Provincial Court of Alberta
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This Consultation Memorandum is based on a paper prepared by P.J. Royal Q.C., "Jury Selection – Challenge for Cause: A Case Study", presented at the Criminal Trial Lawyers' Association Short Snappers Seminar (Edmonton: 22 October 2005).

A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website: *http://www.law.ualberta.ca/alri.*

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THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierrringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004
12.11	Enforcement of Judgements and Orders	August 2004	October 31, 2004
12.12	Summary Disposition of Actions	August 2004	October 31, 2004
12.13	Judicial Review	August 2004	October 31, 2004
12.14	Miscellaneous Issues	October 2004	November 30, 2004
12.15	Non-Disclosure Order Application Procedures in Criminal Cases	November 2004	January 15, 2005
12.16	Trial and Evidence Rules – Parts 25 and 26	November 2004	January 15, 2005

12.17	Costs and Sanctions	February 2005	March 25, 2005
12.18	Self-Represented Litigants	March 2005	April 22, 2005
12.19	Charter Applications Procedures in Criminal Cases	June 2006	August 25, 2006
12.20	Criminal Jury Trials: Challenge for Cause Procedures	April 2007	June 30, 2007

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ALBERTA LAW REFORM INSTITUTE

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PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by June 30, 2007.

This Consultation Memorandum addresses procedures in challenges for cause in criminal jury trials in the Court of Queen's Bench of Alberta.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Criminal Rules Committee [the "Committee"] has identified a number of issues respecting challenge for cause procedures and has made preliminary proposals. These proposals are not final recommendations, but are put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the Consultation Memorandum are received, and may be revised accordingly. While this Consultation Memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and proposals. You may respond to one or more of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

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EXECUTIVE SUMMARY

This summary highlights only some of the issues that the Committee discussed and proposals which it reached. The complete discussion of all issues and Committee proposals are contained in the consultation memorandum.

Chapter 1 provides background for the Issues identified in Chapter 2. Accuseds have both statutory and constitutional rights to jury trials. Both the Crown and the accused are entitled to trials before fair and impartial jury members. To secure this, the *Criminal Code* has established a number of procedures, including challenges for cause on the ground that a prospective juror is not indifferent between the accused and the Queen. To say that a prospective juror is "not indifferent" is to say that the individual is "partial." In Canada, prospective jurors are presumed to be impartial. This presumption may be rebutted on the balance of probabilities by the party alleging partiality, through the challenge for cause procedure.

The challenge for cause procedure has two stages. First, the party must satisfy the trial judge that there is a realistic possibility that prospective jurors are partial, and that they cannot set aside their partiality to judge impartially – their oath and the judge's directions would be insufficient. The party may make out this case on the basis of evidence (including expert evidence), judicial notice, or both. The trial judge has the discretion to establish the questions to be asked in the challenge for cause and otherwise to manage the challenge process. Second, if the judge finds that there is a realistic possibility of partiality, each prospective juror is questioned before two "triers" – two prospective jurors or two jurors who have already been sworn. The triers decide, on the balance of probabilities, whether the challenged juror is partial or impartial.

The *Criminal Code* provides very little guidance for challenge of cause procedures. Only the Northwest Territories has established rules governing these procedures. A number of practices have developed, however.

The Committee offers two main proposals: First, a standard notice of intention to challenge for cause should be developed; this document would be filed and served

along with supporting documentation. Second, the notice should be filed and served at least 60 days before the date set for jury selection. The Committee makes some modest proposals respecting procedures before the judge and before the triers, and respecting courtroom bookings and the establishment of special panels if there are challenges for cause.

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CHAPTER 1. BACKGROUND

A. Introduction[1]

[1] The process of jury selection in criminal cases raises a variety of intriguing issues, including the following:

(a) the selection of the array;[2]

(b) exclusions and exemptions available under Alberta's *Jury Act*;[3]

(c) excuses from jury duty;[4]

(d) judicial "pre-screening" of prospective jurors;[5]

(e) peremptory challenges;[6] and

(f) misuses of challenges for cause.[7]

The focus of this Consultation Memorandum, however, will be on procedures for challenges for cause made under s. 638(1)(b) of the *Criminal Code*. This Chapter shall address (B) the right to an impartial jury; (C) the nature of impartiality; (D) the process for determining impartiality; (E) challenge for cause procedures established by the *Criminal Code*; (F) some challenge for cause practices that have emerged; and (G) the governance of jury selection in other jurisdictions.

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[1] This Consultation Memorandum is based on a paper prepared by P.J. Royal Q.C., "Jury Selection – Challenge for Cause: A Case Study", presented at the Criminal Trial Lawyers' Association Short Snappers Seminar (Edmonton: 22 October 2005) [hereafter "Royal"]. A copy of this paper, without its Appendices, is attached as an Appendix to this Memorandum.

[2] *Criminal Code*, R.S.C. 1985, c. C - 46, ss. 629, 630 [*Criminal Code*].

[3] R.S.A. 2000, c. J -3, ss. 4-5; see Royal, *supra* note 1 at 8.

[4] *Criminal Code*, s. 632.

[5] Royal, *supra* note 1, at 9-10; *R. v. Hazlett* (2005), 205 O.A.C. 298 at para. 3 (C.A.), *per curiam*.

[6] *Criminal Code*, s. 634; Royal, *supra* note 1 at 28-31.

[7] Royal, *supra* note 1 at 8; C. Granger, *The Criminal Jury in Canada*, 2d ed. (Toronto: Carswell, 1996) at 158 [Granger]; D. M. Tanovich, D. M. Paciocco, and S. Skurka, *Jury Selection in Criminal Cases: Skills, Science, and the Law* (Concord, Ont.: Irwin Law, 1997) at 88 (1.5) [Tanovich, Paciocco & Skurka].

B. The Right to an Impartial Jury

[2] An accused charged with an offence falling under s. 536 of the *Criminal Code* has the right to elect trial by jury. Through the operation of ss. 471 and 473 of the *Criminal Code*, offences listed in s. 469 must be tried by jury, unless the accused and the Attorney General consent to trial without a jury before a judge of a superior court of criminal jurisdiction. Under s. 11(f) of the *Charter*, "[a]ny person charged with an offence has the right ... except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment."[8]

[3] The jury must be fair and impartial. Under s. 11(d) of the *Charter*, persons have the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[9] An important consideration in challenge for cause cases, which often turn on issues of race or other general features of the accused or the offence, is that the guarantee of fairness and impartiality extends to all accuseds. Subsection 15(1) of the *Charter* provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[10]

---

[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*]. See Tanovich, Paciocco & Skurka, *supra* note 7, 97), 1-3 (1.1) (on the justification for the jury system); *ibid.* at 7- 13 (1.3) (on s. 11(f)).

[9] "The s. 11(d) of the *Charter* (*sic*) guarantees to all persons charged in Canada the right to be presumed innocent 'until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'. A *Charter* right is meaningless, unless the accused is able to enforce it. This means that the accused must be permitted to challenge potential jurors where there is a realistic potential or possibility that some among the jury pool may harbour prejudices that deprive them of their impartiality:" *R. v. Williams*, [1998] 1 S.C.R. 1128 at para 45, McLachlin J. [*Williams*]; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 at para 25, Binnie J. [*Spence*].

[10] "The accused's right to be tried by an impartial jury ... may also be seen as an anti-discrimination right. The application, intentional or unintentional, of racial stereotypes to the detriment of an accused person ranks among the most destructive forms of discrimination. The result of the discrimination may not be the loss of a benefit or a job or housing in the area of choice, but the loss of the accused's very liberty:" *Williams, supra* note 9 at para. 48.

[4] The Crown, too, is entitled to trial before a fair and impartial jury. The accused does not have the right to a trial unfairly skewed in the accused's favour.[11]

[5] To ensure the fairness and impartiality of jury members, the *Criminal Code* establishes a number of processes, including rights extended to the accused and Crown to an unlimited number of challenges to prospective jurors on the grounds set out in s. 638(1) of the *Criminal Code*.[12] In particular, s. 638(1)(b) provides that the accused and the Crown may challenge on the ground that "a juror is not indifferent between the Queen and the accused."[13]

C. Impartiality and Partiality

1. Nature of Impartiality

[6] To say that a prospective juror is "not indifferent between the Queen and the accused" is to say that the prospective juror is prejudiced, partial, or "not impartial."[14] Lack of impartiality entails that the juror's

> knowledge or beliefs may affect the way he or she discharges the jury function in a way that is improper or unfair to the accused. A juror who is partial or "not indifferent" is a juror who is inclined to a certain party or a certain conclusion. The synonyms for "partial" in Burton's Legal Thesaurus (2nd ed. 1992), at p. 374, illustrate the attitudes that may serve to disqualify a juror:
>
> > bigoted, ... discriminatory, favorably disposed, inclined, influenced, ... interested, jaundiced, narrow-minded, one-sided, partisan, predisposed, prejudiced, prepossessed, prone,

---

[11] See *R. v. Darrach*, 2005 SCC 46, [2000] 2 S.C.R. 443 at para 24, Gonthier J.: "the principles of fundamental justice enshrined in s. 7 protect more than the rights of the accused.... Nor is the accused entitled to have procedures crafted that take only his interests into account. Still less is he entitled to procedures that would distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial." For a Crown challenge for cause, see *R. v. Rogers* (2000), 38 C.R. (5th) 331 (Ont. S.C.J.) at paras 3-8, R. MacKinnon J. (respecting potential bias against an aboriginal victim).

[12] *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at para. 20, McLachlin C.J. [*Find*]; Granger, *supra* note 7, 161.

[13] Tanovich, Paciocco & Skurka argue that, to satisfy constitutional imperatives, all juries must be impartial, competent, and representative: Tanovich, Paciocco & Skurka, *supra* note 7 at 13-27 (1.4).

[14] *Williams*, *supra* note 9 at para. 9; *Find*, *supra* note 12 at para. 30; *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 513; Tanovich, Paciocco, and Skurka, *supra* note 7 at 89 (4.6). An argument may be made that like "real" or "free", the term "impartial" is "only used to rule out the suggestion of some or all of its recognized antitheses:" J. L. Austin, "A Plea for Excuses," in J. O. Urmson and G. J. Warnock, eds., *Philosophical Papers*, 2d ed. (London: Oxford University Press, 1970) 175 at 180.

> restricted, ... subjective, swayed, unbalanced, unequal, uneven, unfair, unjust, unjustified, unreasonable.[15]

Partiality "may incline a juror to believe that the accused is likely to have committed the crime alleged. It may incline a juror to reject or put less weight on the evidence of the accused. Or it may, in a general way, predispose the juror to the Crown ... inclining the juror, for example, to resolve doubts about aspects of the Crown's case more readily...."[16]

[7] McLachlin CJ provided further clarification in the *Find* case, elaborating on what "impartiality" is not:

> "[I]mpartiality" is not the same as neutrality. Impartiality does not require that the juror's mind be a blank slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations. Diversity is essential to the jury's functions as collective decision-maker and representative conscience of the community....[17]

2. Presumption of Impartiality

[8] The "impartiality" analysis begins with a legal rule: Prospective jurors are presumed to be impartial. Nonetheless, a challenge for cause should be permitted if there is a reasonable possibility, reasonable potential, or air of reality to the contention that a prospective juror is not impartial. If a challenge for cause is permitted, the presumption is rebuttable, on the balance of probabilities, by the party alleging partiality.[18]

[9] There is no rule "that accords an automatic right to challenge for cause on the basis that the accused is an aboriginal or member of a group that encounters discrimination...."[19] Nonetheless, while there is no presumption of partiality against

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[15] *Williams*, *supra* note 9 at para. 9.

[16] *Ibid.* at para. 11; see paras. 28 and 29.

[17] *Find*, *supra* note 12 at para. 43.

[18] *Williams*, *supra* note 9 at para. 13; *Spence*, *supra* note 9 at para. 21; Granger, *supra* note 7 at 164; Tanovich, Paciocco & Skurka, *supra* note 7 at 100 (5.2).

[19] *Williams*, *supra* note 9 at para. 41; see para. 52.

accuseds who are members of groups suffering discrimination, Royal makes the following proposal: "[i]t is my firm belief that if defending a member of a visible racial minority and the matter is to proceed before a judge and jury, a challenge for cause ought *always* be [considered][emphasis in original]."[20] The reason for this proposal is that a challenge may uncover partiality that is not manifest but may nonetheless be profound, and that may be acknowledged on questioning:

> In the *Sleigh* case we received some amazingly candid and apparently honestly held opinions from prospective jurors. I do not think they were attempting to avoid sitting on the case, rather they were simply admitting to a clear and deeply imbedded prejudice vis-à-vis Native people.[21]

3. Types of Partiality

[10] There are four main types of partiality:

(a) interest prejudice;

(b) specific prejudice;

(c) generic prejudice; and

(d) conformity prejudice.[22]

McLachlin J. provided a thumbnail sketch of each in *Williams*.

a. interest prejudice

[11] "Interest prejudice arises when jurors may have a direct stake in the trial due to their relationship to the defendant, the victim, witnesses or outcome."[23]

b. specific prejudice

[12] "Specific prejudice involves attitudes and beliefs about the particular case that may render the juror incapable of deciding guilt or innocence with an impartial mind.

---

[20] Royal, *supra* note 1 at 34.

[21] *Ibid.*

[22] Neil Vidmar, "Pretrial prejudice in Canada: a comparative perspective on the criminal jury" (1996), 79 *Jud.* 249 at 252, referred to with approval in *Williams*, *supra* note 9 at para. 10; Neil Vidmar, "The Canadian Criminal Jury: Searching for a Middle Ground" (1999), 62 *Law & Contemp. Probs.* 141 at 155 - 157; *Find*, *supra* note 12 at para. 37; G. A. Ferguson & the Honourable Mr. Justice J. Bouck, *CRIMJI: Canadian Criminal Jury Instructions*, 3d ed., Vol. 1, looseleaf (Vancouver: Continuing Legal Education Society of British Columbia, 1994) at 1.00-16 - 1.00-18 [Ferguson & Bouck].

[23] *Williams*, *supra* note 9 at para. 10.

These attitudes and beliefs may arise from personal knowledge of the case, publicity through mass media, or public discussion and rumour in the community."[24]

c. generic prejudice

[13] "Generic prejudice ... arises from stereotypical attitudes about the defendant, victims, witnesses or the nature of the crime itself. Bias against a racial or ethnic group or against persons charged with sex abuse are examples of generic prejudice."[25]

[14] *Find*, however, demonstrates that establishing partiality on the basis of the nature of the crime, by itself, will be difficult.[26] McLachlin C.J. did state that

> This is not to suggest that an accused can never be prejudiced by the mere fact of the nature and circumstances of the charges he or she faces; rather, the inference between social attitudes and jury behaviour is simply far less obvious and compelling in this context, and more may be required to satisfy a court that this inference may be reasonably drawn. The nature of offence-based bias, as discussed, suggests that the circumstances in which it is found to be both widespread in the community and resistant to the safeguards of trial may prove exceptional. Nonetheless, I would not foreclose the possibility that such circumstances may arise. If widespread bias arising from sexual assault were established in a future case, it would be for the court in that case to determine whether this bias gives rise to a realistic potential for partial juror conduct in the community from which the jury pool is drawn.[27]

d. conformity prejudice

[15] "[C]onformity prejudice arises when the case is of significant interest to the community causing a juror to perceive that there is strong community feeling about a case coupled with an expectation as to the outcome."[28]

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[24] *Ibid.* at para. 10; Tanovich, Paciocco & Skurka, *supra* note 7 at 106 (5.5(a) and (b)).

[25] *Williams*, *supra* note 9 at para. 10; Tanovich, Paciocco, and Skurka, *supra* note 7 at 110 - 117 (5.5(d)). If the challenge concerns an aboriginal accused, Royal reminds us to consider the application of *R. v. Gladue*, [1999] 1 S.C.R. 688: Royal, *supra* note 1 at 11.

[26] Royal, *supra* note 1 at 10.

[27] *Find*, *supra* note 12 at para. 108.

[28] *Williams*, *supra* note 9 at para. 10.

D. The Process for Determining Impartiality

[16] The process for determining whether a prospective juror is partial or impartial involves a division of labour between the trial judge and members (or potential members) of the jury. This process is regulated by statute, judicial discretion, and judicial practices.

1. *Criminal Code* Provisions

[17] The *Criminal Code* establishes the following rules respecting the challenge for cause process:

> 635(1) The accused shall be called on before the prosecutor is called on to declare whether the accused challenges the first juror, for cause or peremptorily, and thereafter the prosecutor and accused shall be called on alternately, in respect of each of the remaining jurors, to first make such a declaration.
>
> (2) Subsection (1) applies where two or more accused are to be tried together, but all of the accused shall exercise the challenges of the defence in turn, in the order in which their names appear in the indictment or in any other order agreed on by them,
>
> (a) in respect of the first juror, before the prosecutor; and
>
> (b) in respect of each of the remaining jurors, either before or after the prosecutor, in accordance with subsection (1).
>
> 638. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that ...
>
> (b) a juror is not indifferent between the Queen and the accused[.]
>
> 639(1) Where a challenge is made on a ground mentioned in section 638, the court may, in its discretion, require the party that challenges to put the challenge in writing.
>
> (2) A challenge may be in Form 41.
>
> (3) A challenge may be denied by the other party to the proceedings on the ground that it is not true.

[The essential averment in Form 41 is simply this: "The (prosecutor *or* accused) challenges G.H. on the ground that (*set out ground of challenge in accordance with subsection 638(1) of the Criminal Code*)."]

> 640. (1) Where the ground of a challenge is that the name of a juror does not appear on the panel, the issue shall be tried by the judge on the voir dire by the inspection of the panel, and such other evidence as the judge thinks fit to receive.
>
> (2) Where the ground of a challenge is one not mentioned in subsection (1), the two jurors who were last sworn, or if no jurors have then been sworn, two persons present whom the court may appoint for the purpose, shall be sworn to determine whether the ground of challenge is true.

> (3) Where the finding, pursuant to subsection (1) or (2) is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.
>
> (4) Where, after what the court considers to be a reasonable time, the two persons who are sworn to determine whether the ground of challenge is true are unable to agree, the court may discharge them from giving a verdict and may direct two other persons to be sworn to determine whether the ground of challenge is true.

[18] Bill C-23, *An Act to Amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)* ("Bill C-23"), was introduced by the Honourable Vic Toews, (then) Minister of Justice. It received second reading in the House of Commons on October 16, 2006, and was referred to the Justice and Human Rights Committee. Section 26 of Bill C-23 amends s. 640 of the *Criminal Code*:

> (2) If the ground of a challenge is one that is not mentioned in subsection (1) and no order has been made under subsection (2.1), the two jurors who were last sworn — or, if no jurors have been sworn, two persons present who are appointed by the court for the purpose — shall be sworn to determine whether the ground of challenge is true.
>
> (2.1) If the challenge is for cause and if the ground of the challenge is one that is not mentioned in subsection (1), on the application of the accused, the court may order the exclusion of all jurors — sworn and unsworn — from the court room until it is determined whether the ground of challenge is true, if the court is of the opinion that such an order is necessary to preserve the impartiality of the jurors.
>
> (2.2) If an order is made under subsection (2.1), two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until twelve jurors and any alternate jurors are sworn.
>
> (3) Where the finding, pursuant to subsection (1), (2) or (2.2) is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.

2. Role of the Trial Judge

[19] The trial judge does not decide whether a prospective juror is partial or impartial. The trial judge has two roles: (a) to determine whether a challenge for cause is permitted at all;[29] and (b) if the trial judge permits a challenge, to manage the challenge process.

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[29] *Ibid* at para. 2.

a. threshold issue: whether the challenge is permitted

(i) the test

[20] In deciding whether to permit a challenge for cause, the trial judge must determine whether the applicant has established a "realistic possibility" or "realistic potential" that the prospective juror is partial (or "not impartial").[30] Again, all applicants must satisfy this test to be permitted to challenge for cause.

[21] "The question is whether there is reason to suppose that the jury pool may contain people who are prejudiced and whose prejudice might not be capable of being set aside on directions from the judge."[31] That is, the judge must be satisfied on (a) the "attitudinal" ground – widespread bias or partiality exists in the community, and (b) the "behavioral" ground – some jurors may be incapable of setting aside this bias or partiality and rendering an impartial decision, despite trial safeguards (ie. the jurors' oath and admonitions from the judge).[32]

[22] The relevant community is the community from which the jury pool is drawn. If it is established that, for example, racial prejudice exists at the national or provincial level, inferences may be drawn that the local community shares those prejudices. Local circumstances, however, may rebut that inference – the local community may have a strong majority of individuals falling within the racial group.[33]

(ii) informational foundation for the application

[23] The realistic possibility cannot be founded on mere assertion or speculation. It may be founded on

(a) evidence, including expert evidence;[34]

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[30] *Williams*, *supra* note 9 at paras. 2, 14, 32; *Spence*, *supra* note 9 at para. 23; *Find*, *supra* note 12 at para. 31; Royal, *supra* note 1 at 7, 11; Tanovich, Paciocco & Skurka, *supra* note 7 at 95 (5.1).

[31] *Williams*, *supra* note 9 at para. 32.

[32] *Spence*, *supra* note 9 at paras. 26, 35; *Find*, *supra* note 12 at para. 32; Royal, *supra* note 1 at 13 (referring to R. v. Gayle (2001), 154 C.C.C. (3d) 221).

[33] *Williams*, *supra* note 9 at para. 41.

[34] *R. v. McKenzie* (2001), 49 C.R. (5th) 123 (Ont. S.C.J.) [McKenzie] (limitations on expert evidence respecting formulation of questions); Tanovich, Paciocco &. Skurka, *supra* note 7 at 144-147 (5.6(d) -

(continued...)

(b) judicial notice;[35] or

(c) both.[36]

Royal advises as follows:

> As for the need to call evidence on the application, unless you are within an exclusively race-based challenge, some evidence ought to be called. Absent a concession from your opponent that a challenge for cause is appropriate, a proper evidentiary foundation is important, although it may be established by the Court taking judicial notice.[37]

[24] Counsel will not get much evidential assistance from the information the Jury Officer provides about prospective jurors:

> ... local Counsel will know that the only information we are provided with by the Jury Officer with respect to the composition of the panel are the names of the individual panelists and their occupations, if known. We used to be provided with the addresses of each of the jurors, however that is no longer the case.[38]

[25] *Viva voce* evidence may be relied on in the application to challenge for cause. There is currently no requirement to provide to the other party a notice of intention to call a witness. Paragraph 657.3(3)(a) of the *Criminal Code* provides that "a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial ... give notice of his intention to do so." It has not been determined whether this provision applies in jury selection, as opposed to proceedings after the accused has been put in charge of the jury. Regardless, the policy of this

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[34] (...continued)
viva voce evidence; 5.6(e) - affidavit evidence; 5.6(g) - expert evidence)); *R. v. Kenny* (1991), 68 C.C.C. (3d) 36 (Nfld. S.C.) (use of telephone survey by experts respecting possible prejudice in jury pool; jury simulations as a basis for expert opinion; unsuccessful application for a stay based on prejudice created by widespread pre-trial media reports).

[35] "In Parks, this court went outside the trial record and beyond the material submitted by the parties to find sociological and empirical support for its conclusions. That form of appellate activism, while appropriate in some cases, should be used sparingly. Appellate analysis of untested social science data should not be regarded as the accepted means by which the scope of challenges for cause based on generic prejudice will be settled:" *R. v. Alli* (1996), 110 C.C.C. (3d) 283 at para. 7 (Ont. C.A.) [*Alli*]; *Williams*, *supra* note 9 at para. 13; see *Spence*, *supra* note 9 at paras. 48-55 (for a discussion of judicial notice); Royal, *supra* note 1 at 8; Tanovich, Paciocco & Skurka, *supra* note 7 at 137-144 (5.6(a)-(c)).

[36] Royal, *supra* note 1 at 11; *Find*, *supra* note 12 at para. 46.

[37] Royal, *supra* note 1 at 17; *Alli*, *supra* note 35 at para. 8.

[38] Royal, *supra* note 1 at 27.

provision is sound – it prevents unnecessary adjournments. Ample notice will permit the other party to retain its own expert, should that be necessary, and to assess the proposed expert evidence properly. Complying with the spirit of s. 657.3(3) in the context of jury selection makes sense.

[26] Expert witnesses should testify orally and be subject to cross-examination. In *Spence*, Binnie J. made the following observations:

> I would add this comment: in *R.* v. *Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, a majority of our Court expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to the value and weight to be given to such studies and reports....
>
> The suggestion that even legislative and social "facts" should be established by expert testimony rather than reliance on judicial notice was also made in cases as different from one another as *Find*, *Moysa*, *Danson*, at p. 1101, *Symes* v. *Canada*, [1993] 4 S.C.R. 695, *Waldick* v. *Malcolm*, [1991] 2 S.C.R. 456, at pp. 472-73, *Stoffman* v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483, at pp. 549-50, *R.* v. *Penno*, [1990] 2 S.C.R. 865, at pp. 881-82, and *MacKay* v. *Manitoba*, [1989] 2 S.C.R. 357. Litigants who disregard the suggestion proceed at some risk.[39]

[27] Counsel should be cautious when seeking to rely on "judicial notice" to establish facts relevant to a challenge for cause. The Supreme Court has adopted strict and narrow versions of the tests for taking judicial notice:

> Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at p. 976. The existence of racial prejudice in the community may be a notorious fact within the first branch of the rule. As Sopinka, Lederman and Bryant note, at p. 977, "[t]he character of a certain place or of the community of persons living in a certain locality has been judicially noticed". Widespread racial prejudice, as a characteristic of the community, may therefore sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence, as here, judges in subsequent cases may be able to take judicial notice of the fact. "The fact that a certain fact or matter has been noted by a judge of the same court in a previous matter has precedential value and it is, therefore, useful for counsel and the court to examine the case law when attempting to determine whether any particular fact can

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[39] *Spence*, *supra* note 9 at para. 68.

> be noted": see Sopinka, Lederman and Bryant, supra, at p. 977. It is also possible that events and documents of indisputable accuracy may permit judicial notice to be taken of widespread racism in the community under the second branch of the rule.[40]

[28] The proof of some facts relating to challenges for cause may be difficult. These facts may be of a general or "social" nature, as opposed to the "adjudicative facts" (who, what, when, where, with what motive, by what instrumentality) at issue between the parties.[41] "As recognized by Doherty J.A.... '[t]he existence and extent of [matters such as] racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts'."[42] Counsel may have difficulty finding an expert to testify on the relevant points. At the same time, the facts may not be so settled that judicial notice may be taken. In the case of "social" or "adjudicative" facts, a practice has developed whereby courts have admitted learned publications or studies or governmental reports as relevant to the proof of the facts.[43] Relying on "paper" alone, though, may be risky. As indicated, the Supreme Court has signalled its preference for witnesses. The more critical or dispositive the issue, the less likely the paper evidence will be admissible and – in the absence of *viva voce* evidence – the more likely the court will insist that the strict judicial notice criteria be satisfied:[44]

> When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.[45]

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[40] *Williams*, *supra* note 9 at para. 54; *Spence*, *supra* note 9 at para. 5.

[41] See *Spence*, *supra* note 9 at paras. 57-69.

[42] *Williams*, *supra* note 9 at para. 35.

[43] *Williams*, *supra* note 9 at paras. 54, 58; *Spence*, *supra* note 9 at para. 33.

[44] *Spence*, *supra* note 9 at para. 68; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 28.

[45] *Spence*, *supra* note 9 at para. 65; see para. 61.

(iii) effects of facts pertaining to racial bias

[29] Evidence of the "attitudinal" component of partiality may provide proof that there is a realistic potential for partiality. Proof of attitude may be proof of behaviour consistent with that attitude. McLachlin J. indicated that "[w]here widespread racial bias is shown, it may well be reasonable for the trial judge to infer that some people will have difficulty identifying and eliminating their biases. It is therefore reasonable to permit challenges for cause."[46] And again:

> Evidence of widespread racial prejudice may, depending on the nature of the evidence and the circumstances of the case, lead to the conclusion that there is a realistic potential for partiality. The potential for partiality is irrefutable where the prejudice can be linked to specific aspects of the trial, like a widespread belief that people of the accused's race are more likely to commit the crime charged. But it may be made out in the absence of such links.[47]

[30] McLachlin J. has cautioned that the prejudice that supports a challenge for cause need not be extreme prejudice: "Extreme prejudice is not the only sort of prejudice that may render a juror partial. Ordinary 'garden-variety' prejudice has the capacity to sway a juror and may be just as difficult to detect and eradicate as hatred."[48]

(iv) accepting the challenge

[31] The other party may agree that challenges for cause are appropriate. This concession, however, does not bind the judge, who is responsible for determining whether challenges should be permitted to go forward.[49] It has not been authoritatively determined whether, if a particular prospective juror is challenged for cause, the other party may accept the particular challenge and agree that the prospective juror be disqualified (even if this concession is made before the triers (see below) are sworn).[50] The danger is that quick acceptance by the other party gives that other party, in effect, unlimited peremptory challenges (since cause for discharge has not been established).

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[46] *Williams*, *supra* note 9 at para. 23; see para. 38.

[47] *Ibid.* at para. 27.

[48] *Ibid.* at para. 39.

[49] Tanovich, Paciocco & Skurka, *supra* note 7 at 159 (6.8).

[50] *Williams*, *supra* note 9, *R. v. Atkinson* (1995), 167 A.R. 191 at paras. 38-41 (Q.B.), Lutz J.

b. Management of process

[32] If the threshold issues have been established and the trial judge permits challenge for cause, he or she must manage the process: "The judge has a wide discretion in controlling the challenge process, to prevent its abuse, to ensure it is fair to the prospective juror as well as the accused, and to prevent the trial from being unnecessarily delayed by unfounded challenges for cause...."[51] In particular, the trial judge determines or approves the questions to be put to the prospective jurors, decides who is entitled to ask the questions, decides (at least under current law) whether the challenge process takes place before prospective jurors, and decides what instructions to provide to the "triers". In managing the challenge for cause process, the trial judge has wide discretion.[52] He or she should bear in mind such considerations as

(a) the privacy interests of prospective jurors (e.g. questioning should not unnecessarily intrude into lifestyle or biography),[53]

(b) fairness to prospective jurors,

(c) the need to avoid unnecessarily lengthening trials, and

(d) the need to avoid unnecessarily increasing trial costs.[54]

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[51] *Williams*, *Supra* note 9 at para.13. On the trial judge's "wide discretion", see *Spence*, *supra* note 9 at paras. 70-71 and *R. v. McLean* (2002), 170 C.C.C. (3d) 330 at para. 7 (Ont. C.A.), *per curiam* [*McLean*].

[52] *Williams*, *supra* note 9 at para. 55; *Spence*, *supra* note 9 at para. 24; Royal, *supra* note 1 at 17, referring to *R. v. Dhillon* (2001), 158 C.C.C. (3d) 353 at para. 51 (BCCA), Low J.A.

[53] See *Atkinson*, *supra* note 50 (respecting proposed questions that were "intrusive and grossly insensitive"); *R. v. S.B.* (1996), 47 C.R. (4th) 56 (Ont. C.J. (Gen. Div.)), Hill J.; *Dhillon*, *supra* note 52 at para. 53.

[54] *Williams*, *supra* note 9 at paras. 53, 55; *Spence*, *supra* note 9 at para. 24.

(i) questions

[33] The trial judge must approve the questions to be put to prospective jurors: "[t]he questioning must be 'relevant, succinct and fair'."[55] The general rule is that the judge should permit the least number of questions requisite to deal with partiality:

> In the case at bar, Hutchison J. at the first trial confined the challenge to two questions, subject to a few tightly controlled subsidiary questions. This is a practice to be emulated.[56]

[34] In the *Sleigh* case, Justice Clackson decided that 14 questions ought to be put to each potential juror. Royal, it should be noted, had based – and could therefore cross-reference – many questions on questions permitted in challenges for cause in other cases.[57] Approval in other cases, while not binding, should have a useful persuasive effect.

(ii) questioner

[35] Royal offers the following observation: "There was no suggestion in [the *Sleigh*] case that anyone other than the Trial Judge was the appropriate person to place the questions and this would certainly seem to be the consistent practice across the country today...."[58] The Canadian Judicial Council comments that "in some jurisdictions, in the interests of impartiality, the judge asks some or all of the

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[55] Granger, *supra* note 7, 177, footnotes omitted; "[i]t is to determine relevancy that the trial Judge must know the basis of the challenge. The questioning should be succinct, because the issue will usually be narrow. It must not be or become a fishing expedition. Above all, it must be fair:" *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279 at para. 46 (Ont. C.A.), aff'd. [1977] 2 S.C.R. 267, Laskin C.J.C. [*Hubbert*] ("We would add that in our opinion the procedure outlined by the Court of Appeal for dealing with challenges for cause provides a useful guide for trial judges called on to deal with such challenges"). See also Tanovich, Paciocco & Skurka, *supra* note 7 at 147 (5.7).

[56] *Williams*, *supra* note 9 at para. 55.

[57] Royal, *supra* note 1 at 24-26. For examples of questions found proper and questions found improper, see Granger, *supra* note 7 at 178-186 and Tanovich, Paciocco & Skurka, *supra* note 7 at 149.

[58] Royal, *supra* note 1 at 34, see 24; *R. v. McLeod*, 2005 ABQB 846, [2005] A.J. No 1572, Slatter J. (who refers to the "usual" Alberta practice); *R. v. Smith*, 2003 NSSC 125, (2003) 217 N.S.R. (2d) 279, [2003] N.S.J. No 355 (Sup. Ct.) (judge asking questions on request of defence counsel); Canadian Judicial Council, *Model Jury Instructions in Criminal Matters*, "Preliminary, Mid-Trial and Final Instructions – Instructions Relating to the Jury Selection Process," 2.2 (Challenges for Cause - Procedure) online: http://www.cjc-ccm.gc.ca/article.asp?id=2501 [Canadian Judicial Council]

questions."[59] However, some authority, including Alberta authority, supports counsel being permitted to put the questions to prospective jurors.[60]

(iii) presence of prospective jurors

[36] Current law establishes broad judicial discretion on the issue of whether prospective jurors should be present during the challenge for cause process. The Canadian Judicial Council makes the following observation:

> There are variations in the procedure followed by judges in cases that involve a challenge for cause. Some judges prefer that the challenge for cause take place in the presence of the other members of the jury panel. Other judges consider that it should take place in the absence of other jury panel members to reduce the risk that prospective jurors might tailor their responses to the questions to facilitate or avoid selection as jurors or to prevent contamination of the remaining jurors. The matter should be discussed with counsel before jury selection begins....
>
> If the challenge is based on pre-trial publicity, the other members of the panel should not be present. If the challenge concerns issues of race, the Supreme Court of Canada has suggested in *R.* v. *Williams*, [1998] 1 S.C.R. 1128 that the challenge should take place in front of the entire panel.[61]

[37] Under the new s. 640(2.1) proposed in Bill C-23, the authority of the judge to exclude prospective jurors from the challenge for cause process is confirmed:

> If the challenge is for cause ... on the application of the accused, the court may order the exclusion of all jurors ... from the court room until it is determined whether the ground of challenge is true, if the court is of the opinion that such an order is necessary to preserve the impartiality of the jurors.

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[59] Canadian Judicial Council, *supra* note 58 at 21.

[60] Royal, *supra* note 1 at 34; *R. v. Michael White* (2006, Alberta Queen's Bench), Moreau J. [no written decision on this point has been published]; *R. v. Kenneth Milton Cardinal* (2006, Alberta Queen's Bench) [no written decision on this point has been published]; *R. v. Guerin and Pimpare* (1984), 13 C.C.C. (3d) 231 (Que. C.A.); *R. v. Proulx* (1992), 76 C.C.C. (3d) 316 (Que. C.A.); *Dhillon*, *supra* note 52; *R.* v. *Lesso and Jackson* (1952), 23 C.R.(N.S.) 179 (Ont. S.C.). Thanks to Laura Stevens for information provided for this note and note 58.

[61] Canadian Judicial Council, *supra* note 58; the Honourable Mr. Justice D. Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Carswell, 2005) at 15, n. 1; Granger, *supra* note 7 at 188; Tanovich, Paciocco & Skurka, *supra* note 7 at 152-153 (6.4), 165 (8.1); *R.* v. *English* (1993), 84 C.C.C. (3d) 511 (Nfld. C.A.) at paras. 121-126; *R.* v. *Moore-McFarlane* (2001), 56 O.R. (3d) 737 at para. 85 (C.A.), Charron J.A., as she then was [*Moore-McFarlane*].

3. Role of Jurors or Prospective Jurors

[38] The issue of whether a prospective juror is impartial or partial is decided by two jurors (if they have already been sworn as jurors) or two prospective jurors (members of the panel). They are known as "triers." Under Section s. 640(2) of the *Criminal Code*,

> ... the two jurors who were last sworn, or if no jurors have then been sworn, two persons present whom the court may appoint for the purpose, shall be sworn to determine whether the ground of challenge is true.

[39] The trial judge must give the triers adequate instructions, so that they understand the nature of their tasks and the rules they must follow.[62]

[40] It appears that the first two triers need not themselves be tried. The fact that one or both later turn out to have been partial does not vitiate the jury selection process.[63]

[41] Under current law, one set of triers does not hear all challenges. Instead, a sequential procedure has been developed: two triers are sworn in (their names being drawn at random from those of the prospective jurors); when a juror is sworn, that juror replaces one trier; the next sworn juror replaces the second; thereafter, each newly sworn juror replaces the longest-sitting trier until 12 jurors are selected.[64] This sequential approach appears to be consistent with the language of s. 640(2), which refers to the challenge being heard by "the two jurors who were last sworn:" the identity of the "last sworn jurors" will change as jurors are sworn.

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[62] *Moore-McFarlane*, *supra* note 61 at paras. 86-88; *R.* v. *Brown* (2002), 166 C.C.C. (3d) 570 at para. 11 (Ont. C.A.), Goudge JA [*Brown*].

[63] Royal, *supra* note 1 at 18; *English*, *supra* note 61 at paras. 115-119; Tanovich, Paciocco & Skurka, *supra* note 7 at 163 (7.2(a)); see *Brown*, *supra* note 62 at para. 16.

[64] Jury Officer Memorandum, appendix to Royal, *supra* note 1 at xvii; see Rutherford J., "Introductory Remarks to Panel," appendix to Royal, *supra* note 1, xx at xxiv; Tanovich, Paciocco & Skurka, *supra* note 7 at 163-164 (7.2(b)); Ferguson and Bouck, *supra* note 22, 1.00-7; *Brown*, *supra* note 62, paras. 17 - 19; *English*, *supra* note 61 [however: use of first two triers to hear all challenges was not reversible error]; "One consequence of this unique procedure ... is that to a considerable degree the members of the jury are responsible for its make-up. I do not propose to explore the implications of this self-selection process for group cohesion.... Another consequence is that through taking part in, as well as observing, the challenge process, the jurors are further educated about the importance of being impartial:" Vidmar, "Canadian Criminal Jury Trial," *supra* note 22.

[42] Bill C-23 would establish a different procedure. If an order is made under s. 640(2.1) to exclude all jurors,

> two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until twelve jurors and any alternate jurors are sworn.

Thus, if a juror exclusion order is granted, a set of two triers is established. The identity of the triers does not change. The two triers hear all the challenges until the requisite number of jurors is sworn. However, the two triers cannot be sworn. Hence, the issue of whether the two triers are partial will not arise.

[43] While ordinarily the only witness in the challenge process is the challenged prospective juror, other witnesses may be called.[65] The opposing party may be permitted to question the prospective juror and to call evidence.[66] Ordinarily, counsel do not address the triers or make submissions to them.[67]

[44] The triers observe the challenge, and decide on the balance of probabilities whether the prospective juror is impartial.[68] The burden of proof lies on the party challenging the prospective juror.[69] The triers decide whether the prospective juror does have the partiality in question, and whether he or she is capable of setting that partiality aside. Thus, in the case of challenge for cause on the basis of racial prejudice, the triers must determine "(1) whether a particular juror is racially prejudiced in a way that could affect his or her partiality; and (2) if so, whether the

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[65] Granger, *supra* note 7 at 188; Tanovich, Paciocco & Skurka, *supra* note 7 at 168 (8.3), (8.4).

[66] Granger, *Supra* note 7 at 188; *Hubbert*, *supra* note 55; Tanovich, Paciocco & Skurka, *supra* note 7 at 169 (8.5).

[67] Granger, *Supra* note 7 at 188; *Moore-McFarlane*, *supra* note 61 at para. 89; see para. 35, *supra*.

[68] Watt, *supra* note 61 at 17.

[69] Granger, *supra* note 7 at 188.

juror is capable of setting aside that prejudice."[70] Under s. 640(3) of the *Criminal Code*,

> Where the finding ... is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.

[45] The triers should be told that they may retire to a jury room to consider their decision if they wish to do so. Otherwise, they may choose to discuss matters where they are.[71]

[46] The triers' decision must be unanimous.[72] They do not need to provide reasons for their decision.[73] If they cannot agree, they should so advise the judge.[74] In these circumstances, the judge may discharge them and direct two other triers to decide the issue.[75] Under s. 640(4) of the *Criminal Code*,

> Where, after what the court considers to be a reasonable time, the two persons who are sworn to determine whether the ground of challenge is true are unable to agree, the court may discharge them from giving a verdict and may direct two other persons to be sworn to determine whether the ground of challenge is true.

The triers' decision cannot be appealed.[76]

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[70] *Williams*, *supra* note 9 at para. 23; "The triers may conclude that the connection between a prospective juror's prejudices and the trial are so small that they cannot realistically translate into partiality. Conversely, the triers might conclude that a prospective juror's beliefs that people of the accused's race are more likely than others to commit the type of crime alleged are highly indicative of partiality:" *ibid.* at para. 31.

[71] Royal, *supra* note 1; *McLean*, *supra* 51, para. 8; *R.* v. *Cardinal*, 2005 ABCA 303 at paras. 15-17, *per curiam* [*Cardinal*]; Watt, *supra* note 61 at 18; *Moore-McFarlane*, *supra* note 61, para. 88; *Brown*, *supra* note 62, para. 13.

[72] *Cardinal*, *ibid.* at para. 17; *McLean*, *supra* note 51 at paras. 6, 9; *Moore-McFarlane*, *supra* note 61 at para. 88.

[73] Granger, *supra* note 7 at 188.

[74] Royal, *supra* note 1 at 18.

[75] Granger, *supra* note 7 at 187.

[76] Tanovich, Paciocco & Skurka, *supra* note 7 at 170 (8.7(c)).

E. Some Challenge for Cause Practices

[47] Some practices have grown up to facilitate challenge for cause procedures. These include the following:

(a) the Jury Officer's attendance at the pre-hearing conference if a jury trial is contemplated, to ensure that he or she is aware of how the trial judge wishes to proceed;[77]

(b) the development of a standard form address by the trial judge to the array, prior to the selection of particular members of the jury, dealing with (*inter alia*) challenge for cause issues;[78]

(c) the development of a standard form set of instructions for delivery by the trial judge to the triers, before they hear a challenge for cause;[79]

(d) the development of guidelines for the challenge for cause hearing, respecting, e.g., whether a prospective juror is sworn, and who is entitled to question the prospective juror;[80] and

(e) the development of a standard form set of instructions for delivery by the trial judge to the triers after the evidence is heard in the challenge for cause and before the triers make their decision.[81]

F. Other Jurisdictions

1. Northwest Territories

[48] The only Canadian jurisdiction to have created rules of court specifically concerning challenges for cause in criminal jury trials is the Northwest Territories. Other jurisdictions do not have criminal rules respecting challenges for cause; neither does the jury legislation of any province or territory make any special provision for challenges for cause in criminal jury trials.

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[77] Jury Officer Memorandum, appendix to Royal, *supra* note 1 at xvi.

[78] Canadian Judicial Council, *supra* note 58 at 2.2 (Challenges for Cause - Procedure).

[79] *Ibid.* at 2.3 (Challenges for Cause - Introductory Instructions to Triers).

[80] Royal, *supra* note 1 at 34.

[81] *Ibid.*; Canadian Judicial Council, *supra* note 58, 2.4 (Challenges for Cause - Final Instructions to Triers).

[49] Part 15 of the *Criminal Procedure Rules of the Supreme Court of the Northwest Territories* provides as follows:[82]

> Challenge for general lack of indifference
>
> 91. Where the accused or the prosecutor seeks, pursuant to paragraph 638(1)(b) of the Code, to challenge for cause every member of a jury panel on the basis of a general lack of indifference, the applicant shall file and serve a notice of motion in Form 1 of the schedule not less than seven days before the date fixed for selection of a jury for the trial.
>
> Application
>
> 92. (1) The application must be supported by an affidavit of or on behalf of the applicant setting out with particularity the grounds for the challenge and the proposed questions to be put to each prospective juror.
>
> (2) The application shall be heard by the trial judge in the absence of the jury panel.
>
> Questions to members of jury panel
>
> 93. (1) If the application is granted, the judge shall specify the form of each question to be put to each prospective juror and who shall ask the questions.
>
> (2) Each member of the jury panel shall be questioned in the presence of the accused and the triers but in the absence of the remainder of the members of the jury panel, who shall be kept in a separate room.
>
> (3) The trial judge may, in his or her discretion, permit counsel to make submissions to the triers.

Form 1 is as follows:

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[82] *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, C.R.C. SI/98-78, online: CanLII <http://www.canlii.org/ca/regu/si98-78/>.

Court File No. _____

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

(*Indicate whether Applicant or Respondent*)

- and -

(*Accused's full name as it appears on the information or indictment*)

(*Indicate whether Applicant or Respondent*)

NOTICE OF MOTION

TAKE NOTICE that an application will be brought on _____ at _____ a.m. (*or* p.m.)
(*month, day, year*)
at _____, for an order granting (*set out relief sought*).
(*specify address of court house*)

THE GROUNDS FOR THIS APPLICATION ARE:

1. That .....
2. That .....
3. Such further and other grounds as counsel may advise and this Honourable Court may permit.

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES ON THE FOLLOWING:

1. (*Set out documents such as transcripts, etc., on which the Applicant relies*)

THE RELIEF SOUGHT IS:

1. An Order allowing the application and granting (*indicate particular relief sought*).

DATED at _____, on _____, ____.
(*month, day, year*)

_____
(*Signature of Applicant or counsel*)

Name, address, telephone and telecopier telephone numbers of Applicant or counsel:

_____
_____
_____
_____

2. British Columbia

[50] A Notice by Associate Chief Justice Dohm dated July 29, 1999 provides as follows:

> Effective immediately, a notice of application for leave to challenge potential jurors for cause on the ground of prejudice (*Williams* applications) shall be filed and delivered to any opposing party at least thirty (30) days before the date set for jury selection. Such applications should be made using Form 1 from the ***Criminal Rules of the Supreme Court of British Columbia, 1997***.[83]

Form 1 is as follows:

SUPREME COURT OF BRITISH COLUMBIA
NOTICE OF APPLICATION

REGINA

APPLICANT/RESPONDENT

v.

(Specify name of accused)
APPLICANT/RESPONDENT

TAKE NOTICE that an application will be made by _____ to the court on _____ day, the _____day of _____, 19___, at the courthouse at _____, for an order granting (*address*)

_____.
(set out relief sought)

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING EVIDENCE:

1. (*Set out documents such as affidavits, transcripts, etc., upon which the applicant relies*)

This application is based upon (*specify the Charter section, statutory authority or other law upon which the application is based*).

It is expected that _____will be needed for the hearing of this application.
(*indicate duration*)

Dated at _____this _____day of _____, 19

(Signature of applicant or counsel)
(Set out name and address,
as well as telephone and fax numbers)

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[83] British Columbia Supreme Court, " Practices Directions and Notices," Criminal, online: <http://www.courts.gov.bc.ca/sc/practice%20directions%20and%20notices/Criminal/Notice%20-%20Application%20for%20Leave%20to%20Challenge%20Potential%20Jurors%20-%20July%2029,%201999.htm>.

3. Other Jurisdictions: General Notice Requirements

[51] Some jurisdictions have sets of rules governing all or a variety of motions in criminal matters. For example, Part 5 of the Manitoba *Court of Queen's Bench Rules (Criminal)*[84] establishes a single form for criminal motions,[85] and requires that the notice of motion set out (*inter alia*) the relief sought, the grounds upon which relief is sought, and the material on which the moving party relies, including statutory provisions.[86] An application to challenge for cause in a criminal jury trial in Manitoba should, it would appear, follow the requirements of Part 5.

[52] Under subrule 6.01(1) of the Ontario *Criminal Proceedings Rules*,[87]

> Where the *Criminal Code* or other federal enactment to which the procedural provisions of the *Criminal Code* apply, authorizes, permits or requires that an application or motion be made to or an order or determination made by a judge of or presiding in the superior court of criminal jurisdiction, or a judge as defined in s.552 of the Criminal Code, other than a judge presiding at trial upon an indictment, the application shall be commenced by a notice of application in Form 1.

Subrule 6.03 goes on to provide that

> Every notice of application in Form 1 shall state
>
> (a) the place and date of hearing in accordance with Rule 6.02 and any other applicable rule;
>
> (b) the precise relief sought;
>
> (c) the grounds to be argued, including a reference to any statutory provision or rule to be relied upon;
>
> (d) the documentary, affidavit and other evidence to be used at the hearing of the application; and
>
> (e) whether any order is required abridging or extending the time for service or filing of the notice of application or supporting materials required under these rules.

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[84] SI/92 - 35, online: CanLII < http://www.canlii.org/ca/regu/si92-35/>.

[85] *Ibid.*, Rule 5.01.

[86] *Ibid.*, Rules 5.03 and 5.04.

[87] Rule 6 (Applications) and its subrules are effective October 13, 2006: online, Ontario Courts <http://www.ontariocourts.on.ca./superior_court_justice/rules/rules.pdf>. The last Gazetted version of the *Criminal Proceedings Rules* is SI/92-99, online: CanLII <http://www.canlii.org/ca/regu/si92-99/whole.html> . The current subrules 6.01(1) and 6.03 represent only minor and stylistic amendments to the predecessor provisions.

On the theory that a "trial" does not begin until the accused is put in charge of the jury,[88] these subrules apply at the stage of jury selection. Hence, an application to challenge for cause in a criminal jury trial in Ontario should follow these subrules.

[53] The Northwest Territories, British Columbia, Manitoba, and Ontario provisions, and, it will be seen, the Committee's proposals, all call for service of a formal notice setting out essentially the same types of information.

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[88] *R.* v. *Basarabas*, [1982] 2 S.C.R. 730, Dickson J; *R.* v. *Emkeit* (1971), 3 C.C.C. (2d) 309 (Alta. S.C. App. Div.), Smith C.J.A.; aff'd., without reference to this point, [1974] S.C.R. 133.

CHAPTER 2. ISSUES

ISSUE No. 1
Is procedural reform respecting challenges for cause necessary or desirable?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[54] In the Committee's view, procedural reform respecting challenges for cause in criminal jury trials is necessary and desirable. The current difficulty is that the process is currently under-regulated and lacks standards. This requires counsel to "re-invent the wheel" with each jury trial. It creates the possibility for inconsistent processes in different cases. It also makes the process too dependent on individual counsel and judges. Challenge for cause procedural guidelines have not made their way into practice notes. Procedural rules often do not find their way into reported cases. In Alberta, jury trials tend to be reserved for very serious offences. Because of the individual and social interests at stake in such trials, procedures should be as transparent, certain, and consistent as possible.

[55] While the majority of criminal trials in Alberta are not jury trials, a substantial number of jury trials are heard each year. The percentage of criminal jury trials in the Court of Queen's Bench has held fairly steady over the last three years, although the number of criminal jury trials has declined over that period. In 2003/2004, there were 90 criminal jury trials and 348 criminal trials in total (26% jury trials); in 2004/2005, there were 93 jury trials and 393 criminal trials in total (24% jury trials); and in 2005/2006, there were 82 jury trials and 338 criminal trials in total (24% jury trials).[89] The Alberta Law Reform Institute has statistics indicating that in 2000, there were 67 criminal jury trials and 409 non-jury criminal trials (14% jury trials) and in 2001, there were 57 jury trials and 397 non-jury trials (12.5 % jury trials).[90] Both the absolute

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[89] These statistics were kindly provided by Alberta Justice, Court Services. The statistics were manually collected. No inference should be drawn that Alberta Justice supports, endorses, or approves of any of the Committee's proposals or analysis: the proposals and analysis are the opinions of the Committee only.

[90] Queen's Bench statistics 2000 - 2001, received from the Court of Queen's Bench, on file with the Alberta Law Reform Institute.

number and percentage of criminal jury trials, then, has increased since 2000. Enough jury trials take place in Alberta to warrant the attention of procedural reform.

ISSUE No. 2
May any current difficulties relating to challenges for cause procedures be resolved without procedural reform, through (in particular) pre-trial conferences or otherwise through the management of criminal litigation?

[56] It may be suggested that difficulties around the challenges for cause could be worked out through case management processes or through pre-hearing conferences.[91]

[57] Subsection 626(2) provides as follows:
In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, before the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under sections 482 and 482.1 to consider the matters that would promote a fair and expeditious trial.

[58] In the *Sleigh* case, a series of pre-trial conferences were held with the trial judge, Justice Clackson. The challenge for cause was discussed, and defence counsel provided a draft of proposed questions.[92]

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[59] In the Committee's view, case management and pre-hearing conferences have a supplemental role in the governance of challenges for cause. These processes, though, likely will not solve all challenge for cause difficulties. Subsection 626(2) itself refers to "the rules of court made under sections 482 and 482.1." But the Court of Queen's Bench does not have such rules relating to challenges for cause. Leaving the regulation of challenge for cause processes to case management and pre-hearing conferences would leave that regulation too dependent on individual counsel and judges.

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[91] See *Criminal Code*, *supra* note 2, s. 625.1.

[92] Royal, *supra* note 1 at 24.

ISSUE No. 3

If procedural reform respecting challenges for cause is necessary or desirable, should the reforms be made through the medium of statute, rules of court, or practice notes/notices to the profession?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[60] In Consultation Memoranda 12.15 and 12.19, we proposed that rules of court are the superior mode of procedural regulation. We maintain this view. What the challenge for cause area requires is some official standardization. Rules are the best means to accomplish this. Of course, particular trials will generate particular issues. Rules should therefore be drafted generally, and judicial discretion to manage the circumstances of trials should be preserved.

ISSUE No. 4

Should written notice that challenges for cause will be pursued be provided at the stage of the pre-hearing conference?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[61] The purpose of the pre-hearing conference is to facilitate subsequent trial proceedings. But the judge and the parties need sufficient information so that the job of the pre-hearing conference can be done. Hence, some notice of intention to challenge for cause should be provided at the pre-hearing conference stage. The *Sleigh* case, and the useful work done in its pre-hearing conferences, supports this conclusion.

[62] Whether the form of the notice need have the contents proposed under Issue 6 below depends on the timing of the pre-hearing conference. Under Issue 7, the Committee proposes that the form of notice be provided 60 days before the jury selection date. If the pre-hearing conference occurs no later than 60 days before the jury selection date, then the notice should have been filed and served prior to the ore-hearing conference and may be relied on at the pre-hearing conference. If the conference takes place prior to 60 days before trial, then oral notice may be provided. It would be useful to the pre-hearing conference process if counsel giving notice provides draft copy of questions to be put to prospective jurors in the challenge for cause process.

ISSUE No. 5
Should written notice of the intention to challenge for cause be required to be provided before trial, if the discretion of the judge not to dispense with written notice is preserved?

[63] Subsection 639(1) of the *Criminal Code* provides that "[w]here a challenge is made on a ground mentioned in section 638, the court may, in its discretion, require the party that challenges to put the challenge in writing." The Northwest Territories rules take a stricter approach. Under rule 91,

> Where the accused or the prosecutor seeks, pursuant to paragraph 638(1)(b) of the Code, to challenge for cause every member of a jury panel on the basis of a general lack of indifference, the applicant shall file and serve a notice of motion in Form 1 of the schedule not less than seven days before the date fixed for selection of a jury for the trial.

That is, the applicant is required to file and serve a form, subject to the court's general dispensing power.

[64] In contrast, the Ontario Court of Appeal held in *Hubbert* that a challenge for cause need not be in writing: "Counsel should put it in writing if the nature of the challenge may bring opprobrium to the juror (such as having been sentenced to 15 months' imprisonment, 10 years ago). The trial Judge can always require that the challenge be put in writing...."[93] The Court of Appeal also held that particulars of the challenge need not be provided:

> The Code does not require that a challenge, oral or written, be particularized. A challenge in the bald words of Form 37 and one or more of paras. (b) to (e) of s. 567(1) is sufficient. But counsel must have a reason, even a generalized one; otherwise he is not acting responsibly.
>
> Furthermore, the trial Judge has to know what the reason is, in more than general words; otherwise he cannot properly direct and control the trial of the truth of the challenge. Counsel must be prepared to state the reason for his challenge, and if he refuses to do so, the trial Judge may refuse to permit the trial of its truth, because that trial cannot properly be had without some definition of the issue.[94]

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[93] *Hubbert*, *supra* note 55; S. R. Stackhouse, "Procedure on Challenge for Cause: Regina v. Hubbert" (1978), 16 *Alta. L. Rev.* 120; *Atkinson*, *supra* note 50 at paras. 27-30.

[94] *Hubbert*, *supra* note 55 at paras. 40-41.

[65] Two issues arise: may rules *require* the filing and service of a form, and, if so, *should* the rules require the filing and service of a form?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[66] First, in the Committee's view, rules may require the filing and service of a form. This is not inconsistent with the discretion recognized under s. 639(1) of the *Criminal Code*. The requirement would not concern challenges under s. 638 generally or all challenges under s. 638, but only challenges under s. 638(1)(b). The judge's discretion to dispense with written notice would not be eliminated. Any rules would recognize that the judge has a dispensing power, to be exercised when justice so requires.

[67] Under Issue 12, the Committee proposes that judicial discretion respecting challenge for cause processes be preserved: the Committee's view is that the preservation of judicial discretion respecting the particular requirement to provide written notice is vital. Grounds supporting a finding of partiality may develop or may only become apparent as the trial approaches. Counsel may not be appointed until shortly before trial. While the notice requirement should work well for ordinary cases, rules must have sufficient flexibility to deal with extraordinary cases.[95] On the other hand the grounds for "general" or "generic" challenges, such as those based on pre-trial publicity or race-based challenges, will be known well before trial.[96]

[68] Second, in the Committee's view, rules should require the filing and service of a form. While *Hubbert* was decided by a strong court and received Chief Justice Laskin's warm endorsement, that case was decided in 1975. Since then, challenges for cause have become exceedingly technical. A challenge may turn on expert evidence, the availability of judicial notice, or the admissibility of learned papers or governmental reports, and on interpretations of relevant authorities. The other party and the judge need an opportunity to assess the basis for the challenge and to develop responses. Furthermore, any challenge for cause will require that some questions be put to prospective jurors. These questions should be thought out in advance. Again,

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[95] Tanovich, Paciocco & Skurka, *supra* note at 151 (6.1).

[96] *Ibid.*

the other party and the judge need an opportunity to decide whether all or any of the questions are appropriate; and even if it is conceded that some of the questions are appropriate, the questions may have to be re-worded to be effective. Failing to provide adequate notice of proposed evidence, authorities, and proposed questions is likely to result in delay. If the judge and all counsel have not had an opportunity to think matters through properly, the jury selection process may be damaged. If the process is seriously damaged, the result may be a new trial – causing delays, expense, and extra work for all involved. Tanovich, Paciocco, and Skurka write as follows:

> To avoid delays or adjournments while opposing counsel or the judge research the matter, it is, at the very least, prudent and courteous to provide notice. There are also practical advantages to doing so. Often the opposing party will agree that it is an appropriate case for a challenge for cause, and when this occurs the need for extensive legal argument can be avoided. It may also be possible to work out the questions in advance, if notice is provided. For these reasons the usual practice is for parties seeking to bring general or generic challenges to provide notice and supporting materials in advance of the application.[97]

Tanovich, Paciocco, and Skurka also make the interesting point (which ties this Consultation Memorandum to Consultation Memorandum 12.19) that if the challenging party relies on *Charter* grounds, rules of procedure governing *Charter* applications, which, in the Committee's view, entails written notice, should apply.[98]

ISSUE No. 6

May a written notice of the intention to challenge for cause contain information in addition to that required by Form 41? If so, what additional information should be conveyed in the notice?

[69] Subsection 639(2) of the *Criminal Code* provides that "[a] challenge may be in Form 41." Form 41 is minimalist. It requires only that the ground under s. 638(1) be set out. One might interpret Form 41 to require only the repetition of the words of the relevant paragraph.

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[97] *Ibid.* at 151 (6.1); *R.* v. *Hoang* (1999), 140 C.C.C. (3d) 226 at para 45 (B.C.C.A.), Ryan J.A.

[98] Tanovich, Paciocco & Skurka, *supra* note 7 at 152.

[70] The Northwest Territories rules go farther. Rule 92(1) provides as follows:

> The application must be supported by an affidavit of or on behalf of the applicant setting out with particularity the grounds for the challenge and the proposed questions to be put to each prospective juror.

[71] It might be argued that counsel are always entitled to use Form 41, regardless of what any rules might say, since the *Criminal Code* allows the challenge to be made using that form.

Criminal Rules Working Committee Proposal

[72] To address the "Form 41 always suffices" argument, two more questions must be answered: Does s. 639(2) permit a requirement to provide more information than required by Form 41? If so, should rules require the provision of more information than required by Form 41? In the Committee's view, the answer to both questions is Yes. Subsection 639(2) is permissive. Furthermore, s. 639(1) provides that the judge "may require the party that challenges to put the challenge in writing." The judge, then, would have the authority to require particulars beyond those of Form 41. The judge could look to rules for guidance in the exercise of his or her discretion. Hence, it appears that creating rules that go beyond the informational requirements of Form 41 is possible. Given the purposes of providing notice mentioned in the reasons for the preceding proposal, rules should provide more information than required by Form 41.

[73] A third question must be answered: What should be the contents of a notice to challenge for cause? In the Committee's view, a form of notice of intention to challenge for cause under s. 638(1)(b) should be developed, setting out the following matters:

(a) particulars of the lack of impartiality: a "reasonably brief" but "adequate," "reasonable," or "sufficient" account of the grounds for the application (a statement of the facts – not evidence – supporting the application and an outline of the legal argument based on those facts), including any facts sought to be established by judicial notice, so that the other party and the judge can know what to expect and so they may prepare accordingly;

(b) a brief description of the types or sources of materials or evidence to be relied on in the application: these may include:

  (i) affidavit evidence of lay witnesses;

(ii) if learned publications or governmental reports are to be relied on, the citations for those publications or reports and the authorities supporting the admissibility of those documents in the proceedings;

(iii) cases relied on to support any additional legal arguments arising in connection with the proposed challenge for cause; and

(iv) an address for service.

If expert evidence will be relied on, the requirements of s. 657.3(3) should be satisfied. The notice should set out the name of the expert, a statement of the expert's qualifications, and a summary of the opinion expected to be given. Under s. 657.3(1), calling an expert could be avoided through the filing of an expert report and sworn qualifications, if the requirements of paragraphs (a) and (b) are satisfied (the court must recognize the person as an expert (and the party intending to produce the report has, before the proceeding, given the other party a copy of the sworn qualifications and the report, and reasonable notice of the intention to produce it in evidence).

[74] The notice should be accompanied by headnotes of and extracts from the cases relied on in the application. In the major centres, where there is access to electronic databases, a list of cases with pinpoint citations may suffice.

[75] The foregoing type of package is a modest elaboration of the British Columbia Supreme Court form, and matches the package recommended by Tanovich, Paciocco, and Skurka: "It is also prudent for the party seeking to bring the challenge to prepare the challenge by assembling, serving, and filing copies of the cases relied on, and the supporting material. Indeed, the prospects of succeeding will be enhanced if the application is accompanied by a brief, clear factum outlining the facts relied on, as well as the relevant principles of law."[99]

[76] The trial judge should be entitled to dispense with or modify the rules, in the interests of justice.

[77] If the "learned publications or governmental reports" that will be relied on are bulky, reference should be made to the relevant pages along with a full citation. If a document is available electronically, the URL for the document should be provided.

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[99] *Ibid.* at 152 (6.1).

[78] The Committee does not favour a general, standardized requirement to file written arguments in addition to the notice of intention to challenge for cause. If counsel has drafted the notice properly, the notice will provide the necessary outline of argument.

[79] Regardless, in some cases, counsel may wish to file written argument or the court may require the filing of written argument. Any practical uncertainties could be resolved by an application for advice and direction, through the pre-hearing conference, or through the interventions of the trial judge.

ISSUE No. 7
How many days before the date set for jury selection should the notice of intention to challenge for cause be provided?

[80] Under rule 91 of the Northwest Territories rules, the notice is to be filed not less than 7 days before the date set for jury selection.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[81] In the Committee's view, 7 days before jury selection is not sufficient time, particularly if the challenging party is raising novel points. Leaving the application too close to the date of jury selection may prevent the sheriff from summonsing a sufficient number of potential jurors.[100] To maintain consistency with the Committee's proposals respecting the time requirements for *Charter* applications in Consultation Memorandum 12.19, the Committee proposes that the notice of intention to challenge for cause be filed and served at least 60 days before the date set for jury selection. The 60 day notice period also ensures compliance in spirit with s. 657.3(3) respecting notices of intention to call expert witnesses at trial.

[82] Again, the trial judge must have the authority to dispense with, abridge, or extend the notice period.

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[100] *Hoang*, *supra* note 97 at para. 25; *McKenzie*, *supra* note 34.

ISSUE No. 8
If the entitlement to challenge for cause is contested, should the other party be required to provide notice of opposition to the application?

[83] The entitlement to challenge for cause may be opposed by the other party. The other party, though, should not be entitled to sit silently after receiving the notice until the trial date. Opposition by ambush is likely to cause delays.

Criminal Rules Working Committee Proposal

[84] If fairness and expediency dictate that a party seeking to challenge for cause should provide notice, along with some particularization of the arguments and authorities supporting the application, then fairness and expediency also dictate that the party opposing the challenge for cause should provide notice of opposition, along with some particularization of the arguments and authorities supporting the opposition.

[85] The Committee therefore proposes that if a party opposes an application to challenge for cause, it should provide a notice of opposition. The initial notice of opposition may be very brief – although, to prevent misunderstanding or misinterpretation, it should be in writing. The initial notice, then, may be provided quickly. The particularization of the bases for the opposition (which may require legal or social-scientific research, or consultation with experts) may require additional time, and so could be provided somewhat later.

[86] The Committee proposes that the notice of objection be provided within 10 days from the date of service of the notice of application. The further particularization of the objection should be provided at least 30 days before trial (i.e., within 20 days following provision of the notice of objection).

[87] Again, the trial judge should have the authority to dispense with, extend, or abridge this notice requirement.

ISSUE No. 9

Should any rules be established respecting the hearing before the trial judge to determine whether the challenge for cause will be permitted?

[88] Under rule 92(2) of the Northwest Territories rules of court, "[t]he application shall be heard by the trial judge in the absence of the jury panel."

Under rule 93(1), "[i]f the application is granted, the judge shall specify the form of each question to be put to each prospective juror and who shall ask the questions." Subsection 93(3) provides that "[t]he trial judge may, in his or her discretion, permit counsel to make submissions to the triers."

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[89] In the Committee's view, the hearing before the trial judge does not require much regulation. The hearing should not be much different than for any other sort of application. The direction found in rule 92(2) likely goes without saying – but then it would not hurt to say it – and the Committee endorses this bit of rule-making for the hearing itself.[101]

[90] Similarly, the directions in rule 93(1) and 93(3) likely go without saying. One of the crucial purposes of a challenge for cause application is to establish the appropriate questions. Another important issue to be determined is whether the judge or counsel should ask the questions. As seen above, sometimes it is appropriate for the judge to ask the questions, sometimes counsel.[102] The judge may also allow counsel to make submissions, aside from asking questions. But again, the Committee endorses the directions in rule 93(1) and 93(3). Their language should be supplemented by indicating that the judge may make any other appropriate ruling respecting the challenge for cause process.

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[101] Granger, *supra* note 7 at 162.

[102] See paragraphs 35 and 43.

ISSUE No. 10
Should any rules be established respecting procedure in challenges for cause before the triers?

[91] Three procedural matters might be dealt within the rules – the separation of the triers and prospective jurors undergoing the challenge procedure from the remainder of the jury panel, the "serial rotation" of triers, and the entitlement of triers to leave the courtroom to deliberate.

[92] Northwest Territories rule 93(2) deals with the first issue: "[e]ach member of the jury panel shall be questioned in the presence of the accused and the triers but in the absence of the remainder of the members of the jury panel, who shall be kept in a separate room."

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[93] In the Committee's view, under current law, rule 93(2) is unduly restrictive. As the quotation from the Canadian Judicial Council set out at paragraph 36 above indicates, sometimes it is appropriate for prospective jurors to observe the challenge process, sometimes it is not. What would be preferrable would be a rule confirming the trial judge's discretion respecting this issue.

[94] A rule could go on to deal with a practical implication of the decision that the challenge process should not take place before the panel. Royal relates the following from the *Sleigh* case:

> Justice Clackson initially indicated that he did not think that two courtrooms ought to be used, however, His Lordship was persuaded that both Courtroom 317, the ceremonial courtroom which is used for jury selection proceedings in Edmonton, and the much smaller adjoining Courtroom 311, ought to be employed and this process proceeded very smoothly. In Courtroom 317, after the jury panel were polled, they were left there and we then moved to Courtroom 311 with the accused and the first two triers who were selected from the jury panel. 20 names were then called forward from those waiting in Courtroom 317 and the challenge for cause then proceeded in Courtroom 311.[103]

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[103] Royal, *supra* note 1 at 33.

Therefore the Committee also proposes that two adjoining courtrooms be booked for challenge for cause procedures.

[95] The "serial rotation" of triers (paragraph 41 above) is mentioned in cases and in the Jury Officer Memorandum.[104] Under the Bill C-23 provisions, the judge may order the exclusion of prospective jurors; if the judge so orders, serial rotation of triers cannot occur. The same two triers hear all challenges until 12 jurors plus alternates are sworn. Rules should nonetheless be designed, not only to cover the possibility that Bill C-23 will not become law, but to cover cases in which the judge does not order the exclusion of prospective jurors. The rules could also deal with the issue of whether the first two triers need be tried themselves. Under s. 640(2) of the *Criminal Code*, the "court may appoint" triers: this provision does not rule out some sort of "prequalification" of the triers by the judge. Since s. 640, however, contemplates that triers, not the judge, determine whether a proposed juror is impartial, the judge's ruling could only be provisional – subject to ratification by two triers.

[96] A rule should confirm that triers are entitled to leave the courtroom to deliberate, in a separate room, and that the judge should remind the triers of this option.

ISSUE No. 11
Should the Sheriff be instructed to constitute a special jury panel if there are to be challenges for cause?

Criminal Rules Working Committee Proposal

[97] Royal writes as follows: "Given that the challenge for cause process will always be time-consuming ... a special panel should be summonsed as the selection obviously cannot take place at the regular Thursday morning jury array."[105] The Committee endorses this suggestion.

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[104] *Supra* note 64.

[105] *Royal*, *supra* note 1 at 27.

ISSUE No. 12
Should standard form instructions to be delivered by the trial judge to the panel and to triers be developed?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[98] The Canadian Judicial Council has prepared authoritative standard form instructions.[106] Hence, this work is already done. The Committee sees no need to add to the Council's labours.

ISSUE No. 13
Should judicial discretion respecting challenge for cause processes be preserved?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[99] Judicial discretion to relax procedural requirements should be preserved, so that procedural rules do not trump *Charter* rights. A useful approach is found in Rule 134 of the Northwest Territories rules: "The Court may, where it considers it necessary in the interests of justice, dispense with compliance with any rule at any time."

[100] As indicated in Consultation Memorandum 12.19, the Committee's view is that punitive consequences for a failure to follow the rules should not be established.

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[106] Canadian Judicial Council, *supra* note 58; see also Watt, *supra* note 61 and Ferguson & Bouck, *supra* note 22.

APPENDIX

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JURY SELECTION – CHALLENGE FOR CAUSE

A CASE STUDY

R. v. CLIFFORD MATTHEW SLEIGH

CRIMINAL TRIAL LAWYERS' ASSOCIATION
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Part I: Introduction

Trial by jury is the cornerstone of our criminal justice system. A jury of 12 persons untainted by predisposition to favour either the Crown or the Defence is the objective at the selection stage. This paper will examine the challenge for cause process found enshrined in section 638 of the *Criminal Code* and will critically examine the topic in the context of an actual case, *R. v. Sleigh*, heard by Mr. Justice Clackson sitting with a jury this past May.

Some broad observations first, however, should be remembered. Writing in 1956 Lord Devlin in Trial by Jury, The Hamlyn Lectures, Eighth Series, Stevens, observed:

> "The English jury is not what it is because some lawgiver so decreed but because that is the way it has grown up. Indeed, its invention by a lawgiver is inconceivable. We are used to it and know that it works; if we were not, we should say that it embodies a ridiculous and impracticable idea. Consider what the idea is. Twelve (why twelve?) men and women are to be selected at random; they have never before had any experience of weighing evidence and perhaps not of applying their minds judicially to any problem; they are often, as the Common Law Commissioners of 1853 tactfully put it, "unaccustomed to severe intellectual exercise or to protracted thought." The case may be an intricate one, lasting some weeks and counsel may have in front of them piles of documents, of which the jury are given a few to look at. They may listen to days of oral evidence without taking notes – at least, no one expects them to take notes and no facility is provided for it in the jury-box, not even elbow room. Yet they are said to be the sole judges of all the facts. At

the end of the case they are expected within an hour or two to arrive at the same conclusion. Without their unanimous verdict no man can be punished for any of the greater offences. Theoretically it ought not to be possible to successfully enforce the criminal law by such means.

How is it done? Two answers to that question can be given at once. The first is that the account which I have just given of the jury process, though not inaccurate, is a very superficial one. There is a great deal going on beneath the surface that tends to shape the jury's verdict. Most lawyers would readily assent to the generalisation that the jury is the sole judge of all questions of fact and the jury itself is invariably told that it is; but it is a generalisation that, when one stops to think more about it, is found to need a good deal of qualifying. The second answer is that the jury system is not something that was planned on paper and has to be made to work in practice. It developed that way simply because that was the way in which it was found to work and for no other reason." (at pp. 4-5)

and later:

"JURY AS SAFEGUARD OF INDEPENDENCE
AND QUALITY OF JUDGES

This is all that I have to say about the jury as an instrument for doing justice. But its value does not lie solely in the fact that for some cases is it the best judicial instrument. It serves two other purposes of great importance in the constitution. The first and lesser of these is that the existence of trial by jury helps to ensure the independence and quality of the judges. Judges are appointed by the executive and I do not know of any better way of appointing them. But our history has shown that the executive has found it much easier to find judges who will do what it wants than it has to find amenable juries. Blackstone, whose time was not so far removed from that of the Stuarts, thought of the jury as a safeguard against "the violence and partiality of judges appointed by the Crown." Commenting on that in 1784, Mr. Justice Willes said: "I am sure no danger of this sort is to be apprehended from the judges of the present age: but in our determinations it will be prudent to look forward into futurity." Although in 1956 we may claim that "futurity" has not yet arrived, it still remains prudent to look forward into it.

I spoke of the quality of the judges as well as of their independence. I did not mean by that their quality as lawyers or even as virtuous men: that must be left to the Lord Chancellor. I meant their quality as purveyors of the sort of justice that the Englishman wants to have. The malady that sooner or later affects most men of a profession is that they tend to construct a mystique that cuts them off from the common man. Judges, as much as any other professional, need constantly to remind themselves of that. For more than seven out of the eight centuries during which the judges of the common law have administered justice in this country, trial by jury ensured that Englishmen got the sort of justice they liked and not the sort of justice that the government or lawyers or any body of experts thought was good for them. The very high percentage of non-jury cases in the civil lists, coupled with the fact that there is no great pressure for trial by jury, entitles the judges to claim that the justice they dispense is still, in the best sense of the word, popular justice. But it is well to remember that if judges ceased to be popular, if their outlook became remote from that of the ordinary man, trial by jury is there as the alternative.

JURY AS A SAFEGUARD AGAINST REPUGNANT LAWS

The second and by far the greater purpose that is served by trial by jury is that it gives protection against laws which the ordinary man may regard as harsh and oppressive. I do not mean by that no more than that it is a protection against tyranny. It is that: but it is also an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement. They have in the past used their power of acquittal to defeat the full operation of laws which they thought to be too hard. I daresay that the cases in which a jury defies the law are very rare. Juries do not deliberately marshal legal considerations on one side and broader considerations of justice and mercy on the other and bring them into conflict on the field of conscience. Their minds are not trained to the making of an orderly separation and opposition; they are more likely to allow one set of considerations to act upon the other in such a way as to confuse the issues. One way or another they are prone to give effect to their repugnance to a law by refusing to

> convict under it, and no one can say them nay. The small body of men, who under modern conditions constitute the effective body of legislators, have to bear this in mind. It affects the character of the laws they make, for it is no use making laws which will not be enforced. They may put it down to the perversity of juries, though for my part I think that if there is a law which the juryman constantly shows by his verdicts that he dislikes, it is worth examining the law to see if there is something wrong with it rather than with the juryman. I do not mean that juries are altogether blameless in this respect; I have already recorded the opinions of two eminent judges on juries and the traffic laws. Juries are not often too tender to the wicked but they sometimes are to the foolish. I think that a juryman, if he can visualise the possibility of finding himself in the same situation as the man in the dock, finds it very difficult to be firm; it is an inevitable defect of the system that jurymen are not practised in detachment. It may be, therefore, that the jury system means that some good and necessary laws are only weakly enforced. Likewise, democracy may mean that some good and necessary measures of government are not taken when they should be. There are no freedoms to be got without payment." (pp. 158-160)

The two hallmarks of our modern jury system – the absence of declared reasons and the secrecy of deliberation are critical. Historically, the jury verdict was unassailable on appeal and those who opposed the creation of a Court of Criminal Appeal in the United Kingdom "...argued that the greatest significance for the innocent was that juries knew that their decisions were final". See A History of English Criminal Law, Sir Leon Radzinowicz and Roger Hood, 1986, Stevens, Vol. V, p. 761.

Part II: Challenge for Cause – The Law

(i) The Code

In Appendix 1 the relevant sections of the *Criminal Code* with respect to jury selection are found. Sections 638-640 deal with challenge for cause:

Challenge for cause/No other ground.

638. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

(a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;

(b) a juror is not indifferent between the Queen and the accused;

(c) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;

(d) a juror is an alien;

(e) a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under section 627, is physically unable to perform properly the duties of a juror; or

(f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

No other ground

(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

(3) [*Repealed,* 1997, c. 18, s. 74]

(4) [*Repealed,* 1997, c. 18, s. 74]. R.S., c.-34, s. 567; 1977-78, c. 36, ss. 5, 6; R.S.C. 1985, c. 27 (1st Supp.), s. 132; c. 31 (4th Supp.), s. 96; 1997, c. 18, s. 74; 1998, c. 9, s. 6

Challenge in writing/Form/Denial

639. (1) Where a challenge is made on a ground mentioned in section 638, the court may, in its discretion, require the party that challenges to put the challenge in writing.

(2) A challenge may be in Form 41.

(3) A challenge may be denied by the other party to the proceedings on the ground that it is not true.

R.S.C. 1970, c. C-34, s. 568.

Objection that name not on panel/Other Grounds/If challenge not sustained, or if sustained/Disagreement of Triers

640. (1) Where the ground of a challenge is that the name of a juror does not appear on the panel, the issue shall be tried by the judge on the *voir dire* by the inspection of the panel, and such other evidence as the judge thinks fit to receive.

(2) Where the ground of a challenge is one not mentioned in subsection (1), the two jurors who were last sworn, or if no jurors have then been sworn, two persons present whom the court may appoint for the purpose, shall be sworn to determine whether the ground of challenge is true.

(3) Where the finding, pursuant to subsection (1) or (2) is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.

(4) Where, after what the court considers to be a reasonable time, the two persons who are sworn to determine whether the ground of challenge is true are unable to agree, the court may discharge them from giving a verdict and may direct two other persons to be sworn to determine whether the ground of challenge is true.

R.S.C. 1970, c. C-34, s. 569.

The focus of the modern challenge for cause is section 638(1)(b) – the assertion that the members of the jury panel are not indifferent between Crown and Defence; they lack impartiality: there is a very realistic potential for bias, that the bias may not be set aside and will play a part in the ultimate decision of the jury.

(ii) The Purpose of the Challenge for Cause

A challenge for cause is not proper merely to find out what kind of juror a person summonsed is likely to be. It is not designed to be an aid in deciding whether to exercise a peremptory challenge, although obviously it may be very useful in Counsel's decision to challenge peremptorily if the trial of the challenge is dismissed and the potential juror found acceptable by the triers. It is not a fishing expedition. It is said that Counsel do not have the right by using a challenge for cause to impanel a favourable jury. Rather, the challenge for cause is appropriately employed where there is a demonstrable, realistic potential, or possibility for the existence of partiality on grounds clearly articulated in the application, and that that partiality cannot be set aside. For example, if the prospective juror was biased against a member of a racial minority, the inquiry would focus on whether the prejudice would cause the juror to discriminate against the accused who was a member of that particular racial minority group.

Counsel should refer here to *R. v. Hubbert* (1975) 31 C.R.N.S. 27 (Ont. C.A.); affirmed by the S.C.C. (1977) 33 C.C.C. (2d) 207n, the Supreme Court referring to the challenge for cause process discussed by the Ontario Court of Appeal in *Hubbert* as constituting "a useful guide". Also see: *Sherratt v. The Queen* (1991) 63 C.C.C. (3d) 193 (S.C.C.); a trial judge cannot usurp the challenge for cause process by improperly pre-screening the jury panel, rather the issue of alleged lack of partiality if *prima facie* made out, is for the triers to decide in the challenge for cause process.

We are not speaking here of the Court's initial responsibility to ensure that only properly qualified, non-exempt persons are summonsed and appear as members of the panel. Clearly the members called must be qualified to sit as provided for in the appropriate Provincial Legislation, for example, in Alberta see The Jury Act, R.S.A. 2000 c. J-3.

As Mr. Justice Doherty noted in *R. v. Parks* (1993) 84 C.C.C. (3d) 353 (leave denied to appeal to the Supreme Court of Canada (1994) 87 C.C.C. (3d)(vi)):

> "A juror's biases will only render him or her partial if they will impact on the decision reached by that juror in a manner which is immiscible with the duty to render a verdict based only on the evidence and an application of the law as provided by the trial judge." (p. 364)

Parks is a very useful and thorough review of the challenge for cause process and is required reading. The Court cautioned against employing the challenge for cause to attempt to indoctrinate prospective jurors with the position of the Defence to be ultimately advanced at trial. Judicial notice was taken of wide-spread anti-black racism in Metropolitan Toronto by the Ontario Court of Appeal, such that there existed "a very realistic possibility" that a potential juror would be both biased against the black accused charged with the murder of a white man and that the juror would be influenced in his or her deliberations by the bias. Thus in reversing the Trial Judge, who had refused to permit a challenge for cause on the basis of race, the Court would permit the putting of the following question to prospective jurors in a challenge for cause:

> "As the judge will tell you, in deciding whether or not the prosecution has proven the charge against an accused a juror must judge the evidence of the witnesses without bias, prejudice or partiality:
>
> Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black [Jamaican immigrant] man and the deceased is a white man?"

Also see:

> *R. v. Zundel* (1987) 31 C.C.C. (3d) 97 (Ont. C.A.) Prospective jurors may not be challenged on general grounds related to their opinions and beliefs.
>
> *R. v. Keegstra (No. 2)* (1991) 63 C.C.C. (3d) 110 (Alta.C.A.) Trial Judge ought to have permitted the challenge for cause as a result of extensive pre-trial publicity.
>
> *R. v. Pheasant* (1995) 47 C.R. (4th) 47 (Ont. C. J.) per Hill J. There must be some articulable reason for believing that a belief or bias carries the real potential or reasonable prospect that a juror may not be indifferent. A fishing expedition is not allowed with respect to the juror's personal information. His Lordship proposed an air of reality test with respect to the issue of lack of indifference but said that the test is not onerous. This was a marginal case in which a trial judge permitted a challenge for cause in a domestic violence case.

(iii) The Role of the Judge and a Word on "Pre-Screening"

There is, as above-noted, a limited role for the judge to perform in some pre-screening of the panel to deal with obvious and clear-cut cases of partiality. For example, where a prospective juror is related to the accused or to one of the Counsel in the case, see *Sherratt v. The Queen, supra.* The Supreme Court of Canada reminds us in *Barrow v. The Queen* (1987) 38 C.C.C. (3d) 193 that questions of partiality are for the triers and not for the Court through some form of pre-screening process. Also see *R. v. Geurin and Pimpare* (1984) 13 C.C.C. (3d) 231 (Que. C.A.) where the trial judge refused a challenge for cause but purported to screen jurors himself. The court made it clear in overturning the convictions that impartiality is a question of fact and not a question of law. It is a question for the triers and not for the judge. Also see *R. v. Betker* (1997) 115 C.C.C. (3d) 421 (Ont. C.A.) discussed in more detail *infra*, where the Judge, although refusing the challenge for cause, purported to vet the panel himself, the accused having been charged with a historical sexual assault involving his daughter 25 years previously.

In *R. v. Cardinal* [2005] ABCA 303, the Court of Appeal reversed in a homicide case in the following circumstances:

> "Early on in the challenge process, the trial judge started to dismiss a potential juror who had answered "probably" to the question posed. Defence counsel began to interject and the trial judge caught himself and told the triers it was a matter for them to decide, and they were to disregard what he had just said. One of the triers then said, "Excused, please".
>
> Later, the trial judge dismissed a potential juror who answered "yes" to defence counsel's question. The trial judge did not put the matter to the triers. Cardinal argues that by doing this the trial judge usurped the trier's function, a legal error reviewable on a correctness standard. Cardinal also argues the trial judge erred because his explanation to the triers regarding their function and duties was deficient."
> (at p. 2)

The Court held that the Trial Judge had usurped the trier's function. He erred legally, thus warranting a new trial, the Court refusing to apply the curative proviso found within section 686 of the *Criminal Code*. The Court followed and applied *Barrow* where the Supreme Court said: "Usurpation of this sort is so severe an error of law by the judge that it mandates a new trial, even if no prejudice to the accused can be shown..." [1987] 2 S.C.R. 694 at 714.

(iv) Generic Prejudice – The Nature of the Crime Alone – Can this Constitute the Basis for a Challenge for Cause?

On the authority of *Find v. The Queen et al* [2001] 154 C.C.C. (3d) 97 (S.C.C.), the nature of the crime is not a sufficient ground for a challenge for cause. In other words, alleged generic prejudice arising from the type of offence the accused is facing (for example sexual assault on a minor) will not be sufficient standing on its own to ground a successful challenge for cause. The Court was concerned with both the

attitudinal and behavioural components of the alleged partiality. Attitudinal partiality is concerned with the existence of a material bias and behavioural partiality involves an inquiry into the potential affect of the bias on the trial process.

There is a presumption, said the Court, of juror impartiality which can be displaced by calling evidence or persuading the Court to take judicial notice or both. Is there a "realistic possibility" that some jurors may not decide the case on the evidence presented, but rather on the basis of their preconceived attitudes or beliefs?

In order to persuade the Court that a challenge for cause is appropriate, counsel must show that a "realistic potential" exists such that the summonsed jury panel may contain individuals who are not impartial. To do so generally requires establishing a wide-spread bias existing in the community and that some juror or jurors may not be able to set this aside. *Find* is a critical decision and is required reading.

R. v. Bettker, supra, is another case where the nature of the charge was not sufficient to permit a challenge for cause. The Trial Judge took it upon himself however to vet the jury and was criticized for so doing, although his error turned out to be harmless. (The Supreme Court in *Williams* in 1998 *infra* is critical of some of the broad language found in *Bettker*, see *Williams* at page 492 in the *Canadian Criminal Cases Report).*

(v) The Successful Challenge for Cause – Some Examples

(a) Race

The impact of the decision in *R. v. Gladue* (1999) 23 C.R. (5th) 196 (S.C.C.) cannot be underestimated here with the Court taking judicial notice with respect to the disadvantages historically suffered by native people - disadvantages from which they continue to suffer today. If the Court is prepared to take judicial notice

with respect to such matters, then that will have, and has had, a significant impact on the ability to challenge for cause.

The leading case is undoubtedly *Williams v. The Queen* (1998) 124 C.C.C. (3d) 481 (S.C.C.). The accused, a British Columbia aboriginal, was charged with robbery and wanted to challenge each of the prospective jurors for cause, he having presented some evidence to the Court which alleged widespread racism against aboriginal people in Canada. Although this had been allowed at his first trial which resulted in a mis-trial, the Trial Judge presiding at the second trial would not permit the challenge to go forward. Ultimately, the Supreme Court of Canada held that a challenge for cause ought to have been allowed and held that absent evidence to the contrary, where widespread prejudice against people of the accused's racial group has been demonstrated at a national or provincial level, it will also be reasonable to infer that such prejudices are replicated at the community or local level. Racism against aboriginals includes stereotypes that relate to credibility, worthiness, and criminal propensity, said the Court. Challenge for cause is an essential safeguard of the accused's right to a fair trial as enshrined within section 11(d) of the *Charter*. The Court held that at the preliminary stage of determining whether or not a challenge for cause ought to be permitted, proof that the jurors would not be able to set aside any prejudices they may harbour, is to ask the question that should ultimately be determined by the trier of fact. In other words, requiring the accused to present evidence that prospective jurors would be unable to set aside their prejudices as a condition to bringing the challenge for cause, is to set the accused an impossibly onerous task. The Supreme Court of Canada approved the following two questions being asked:

1. Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is an Indian?

2. Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is an Indian and the complainant is white?

It is interesting to note that the accused's defence was that he had not committed the offence, but rather another Native male had.

After *Williams*, the Ontario Court of Appeal in *R. v. Koh, et al* (1998) 131 C.C.C. (3d) 257 interpreted the decision in *Williams* to stand for the proposition that absent a sustainable objection from the Crown, a Trial Judge should allow a challenge for cause by a member of a visible racial minority without first requiring strict compliance with the precondition that the accused establish a realistic potential for the existence of partiality. The fact that racism exists with respect to visible minorities in Canada is, said the Court, a notorious fact which has repeatedly received judicial notice.

The end result of these two cases is that wherever an allegation of racial prejudice is advanced at the challenge for cause stage, a Trial Judge would have to find that a *prima facie* case for a challenge for cause had been made out. The Court in *Koh* said there is no compelling reason why all accused who are members of a visible racial minority should not have a right to challenge prospective jurors for cause.

R. v. Gayle (2001) 154 C.C.C. (3d) 221 – In this case a rolled-up question was permitted, both with respect to the attitudinal and behavioural component of partiality. The Court recognized the unique position of the Trial Judge in assessing the appropriateness of the question or questions, the form and content of which very much turn on the circumstances of the particular case. The application raised an interesting question procedurally where the triers could not agree and the Judge took it upon himself to dismiss the potential juror over the objection of the Defence. He did so pursuant to section 640(4) of the *Code* and this decision, which was discretionary, was upheld by the Ontario Court of Appeal.

R. v. Wilson (1996) 107 C.C.C. (3d) 86 (Ont. C.A.) – This case simply extends the *Williams/Parks* principles to an area outside of Metro Toronto, namely, Whitby, Ontario.

R. v. Mankwe [2001] 3 S.C.R. 3 on appeal from the Que. C.A. decision (1997) 12 C.R. (5th) 273 – The Trial Judge had not permitted a race-based challenge for cause and this decision was affirmed by the Quebec Court of Appeal. The Supreme Court, given a Crown concession in that Court, allowed the appeal and a new trial was ordered. The four questions proposed in that case were as follows:

1. Do you believe that black persons commit more crimes in Canada than persons of other races?

2. Do you believe that black persons commit more violent crimes in Canada than persons of other races?

3. Do you believe that black persons commit more crimes of a sexual nature in Canada than persons of other races?

4. Do you believe that black persons have a greater tendency to lie than persons of other races?

R. v. Spence (2004) 190 C.C.C. (3d) 277 (Ont. C.A.) (presently on reserve in the Supreme Court of Canada). The accused was black, charged with robbery, and the victims in turn were a white person and an East Indian person. The issue that arose was whether or not the accused could challenge for cause, not just with respect to the fact that he was black, but also with respect to the victims being white and East Indian. Defence Counsel wanted to ask the following question in the challenge for cause process:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man charged with robbing white and East Indian persons?

The Trial Judge allowed the jury members to be canvassed on the basis that the Respondent was black, but would not allow a question addressing the inter-racial nature of the crime. On appeal, the majority of the Court of Appeal allowed the appeal, set

aside the conviction, and ordered a new trial on the basis that the accused ought to have been allowed to ask a question in the challenge for cause process addressing the inter-racial nature of this crime. The Crown's appeal to the Supreme Court of Canada, bearing Appeal No. 30642 was as of right given the dissent of The Honourable Mr. Justice Laskin. It was argued on June 9, 2005 before a Court composed of Justices Major, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. and as noted judgment was reserved.

R. v. Brown; R. v. Walker (2005) 194 C.C.C. (3d) 76 (Ont. C.A.) – The Court of Appeal found no error in the manner in which the race-based challenge for cause was conducted notwithstanding that the instruction to the triers appeared to be somewhat incomplete, for example, they were not told that their finding of partiality had to be to the civil standard of proof on a balance of probabilities. Further, there was nothing said about their decision having to be unanimous nor that they could retire in order to consider the matter. Lastly, there was nothing said to them about their having the right to disagree. The Court said it was satisfied however on a review of the proceedings that all of the above would have been clear to the triers as they went through the process.

(b) Section 745.6 of the *Criminal Code*

The so-called 15 year faint-hope clause often generates very strong opinions in the mind of prospective jurors and this was acknowledged by Mr. Justice Watt in the matter of *R. v. Serplus* (1999) 27 C.R. (5th) 306. The Court permitted a challenge for cause notwithstanding that very little evidence was called. His Lordship was careful to say that this was not an offence-based challenge (although arguably it comes quite close to being so). Very recently in Edmonton a similar challenge for cause was successful in a 745.6 hearing involving a female prisoner, Yvonne Johnson. In speaking with her Counsel, Charles Davison, a number of prospective jurors were successfully challenged for cause, and in the end result, the jury reduced Ms. Johnson's

parole ineligibility period down to 15 years. Justice C. P. Clarke allowed the challenge for cause during the course of a pre-trial conference and the proceedings were ultimately presided over by The Honourable Mr. Justice J. Gill (No. 041140555X1).

(c) Pre-Trial Publicity

R. v. Keegstra (No. 2), supra.

R. v. Hummel (2002) 166 C.C.C. (3d) 30 (Y.T. C.A.) The challenge here was doubled-barrelled involving both race and pre-trial publicity. The case involved a sexual assault by a Native person on a white woman. The Court would not permit during the challenge for cause process, the posing of a question to the effect of whether the juror believed that a white woman is less likely to consent to sex with an aboriginal man than with a Caucasian man. The case is also useful because it speaks about the control of the process by the Trial Judge, that is, balancing the right to a fair trial on the one hand whilst respecting the privacy rights of potential jurors on the other.

(d) The Poor

R. v. Clarke [2003] O.J. No. 3883 (S.Ct.)

(vi) Certain Procedural Matters & Matters of Process

Much of this has been touched on already, but the following cases should also be noted:

R. v. Dhillon (2001) 158 C.C.C. (3d) 353 (B.C.C.A.) – The Court recognized a broad discretion is enjoyed by the Trial Judge in controlling the challenge

for cause process. It should not be overly intrusive and it is certainly not for the purpose of inquiring into a particular juror's lifestyle or biography and in this respect it follows *Hubbert, supra.* Two questions were permitted in this case:

> 1. Would your ability to judge the evidence in this case without bias, prejudice or partiality be effected [sic] by the fact that the person charged is an East Indian or of Indo-Canadian origin?
>
> 2. Would your ability to judge the evidence in this case without bias, prejudice or partiality be effected [sic] by the fact that the person charged is an East Indian or of Indo-Canadian origin and the complainant is a 12 year old young woman or girl of Chinese-Canadian origin?

It is of interest to note that these questions were posed by Counsel directly to the prospective jurors.

As for the need to call evidence on the application, unless you are within an exclusively race-based challenge, some evidence ought to be called. Absent a concession from your opponent that a challenge for cause is appropriate, a proper evidentiary foundation is important, although it may be established by the Court taking judicial notice.

R. v. Alli (1996) 110 C.C.C. (3d) 283 (Ont. C.A.) reminds us of the importance of calling evidence. The issues in that case involved prejudice vis-à-vis a homosexual accused who was also a member of a visible minority. On the challenge for cause application, the Appellant called no evidence in support of either proposed ground of challenge. The Court was alive to what it had done previously in *Parks,* that is, despite the absence of supporting evidence at trial, the Court held that in cases tried in Metropolitan Toronto involving a black accused, a challenge for cause ought to be allowed based on the simple allegation of racial bias. The Court was not prepared to extend the almost automatic right to challenge for cause recognized in *Parks* to the much broader concept suggested in this case, that is, a combination of racial prejudice

and to prejudice based on sexual preference. The Court held in the circumstances that it could not be said that the Trial Judge had erred in the exercise of his broad discretion in refusing the challenge for cause.

R. v. English (1993) 84 C.C.C. (3d) 511 (Nfld. C.A.) involved the trial of one of several accused arising out of the Mount Cashel Inquiry. Raised on appeal was the question of whether or not the first two triers have to first be tried themselves by someone, presumably by the Trial Judge, although clearly the *Code* does not mandate this and this was not something that found favour with the Court. The challenge for cause was based upon the wide-spread publicity the Inquiry had generated. After the first two triers had selected two jurors, they replaced the original triers who then returned to the jury panel. Eventually, the two original triers came before the Court for selection. One of them was found to be partial and therefore unacceptable and the second one, although found to be impartial, was stood aside when it became known that she was related to one of the Crown Counsel involved in the prosecution of other persons charged out of the Mount Cashel affair. The Court held that the decisions by the first two triers, who, as noted, were not tried themselves until much later in the process, were not clearly wrong and there was nothing on the record to sustain the complaint that the initial triers had been partial in their earlier decisions. Furthermore, the Trial Judge did not err in refusing to permit questioning of prospective jurors as to their religious affiliation. Lastly, the Court decided that section 640 does not specifically provide for the procedure to be followed with respect to the initial triers. The Trial Judge's decision to keep the initial triers in place until two jurors had been selected, was not a reversible error.

R. v. McLean (2002) 170 C.C.C. (3d) 330 (Ont. C.A.) – This case provides some direction on the sorts of instructions that the triers should be given by a Trial Judge explaining the notion of partiality; the standard is the civil standard of proof on a balance of probabilities; the need for unanimity and that they should be told that they could retire to consider their decision if they wished to do so.

R. v. Brown; R. v. Walker, supra – Again, a case where instructions were not complete, but no substantial wrong or miscarriage of justice was occasioned and thus the appeal stood dismissed.

R. v. Patterson (2003) 174 C.C.C. (3d) 193 (Ont. C.A.) – Again, in instructing the triers, the Trial Judge neglected to mention that the standard of proof was on a balance of probabilities rather he said, "It must be to your satisfaction". Furthermore, he did not make it clear that unanimity was required, nor did he tell them that they could retire to consider their verdict. Once again, these failings did not amount to reversible error.

Lastly, *R. v. Cardinal, supra* – The Alberta Court of Appeal very recently have made it clear that there are five areas of direction that the Trial Judge must give the triers and they are as follows:

1. The triers are to decide if the potential juror is impartial.
2. This must be done on a balance of probabilities.
3. The decision must be by both triers.
4. They may retire to the jury room or to discuss it where they are.
5. If the triers cannot agree within a reasonable time they are to say so.

Part III: The Queen v. Sleigh

On Sunday September 6, 1992, six year old Corrine "Punky" Gustavson was abducted from her yard in North East Edmonton while playing with a friend. Her body was found two days later in a truck yard in Sherwood Park, just outside the City limits. She had been sexually assaulted; Dr. Marlene Lidkea, who was qualified as an

expert witness entitled to opine upon the injuries sometimes associated with sexual assault, described the injuries to the dead girl's genitalia as the worst she had ever seen in the roughly two thousand cases she had examined over her twenty years of practice. It was likely that she had been killed elsewhere and then the body taken to the truck yard where it was left in the open. There was no clear cause of death, but the Medical Examiner was of the view that potential causes of death included smothering, blood loss, and shock.

The death of this young girl prompted an immediate and continued outcry from the citizens of Edmonton. The community became involved in the investigation itself and there was substantial and continued media publicity surrounding the case. Significant and ongoing pressure was exerted from both the deceased's family and the community to find the killer. There was massive media attention during the brief search for the young girl and for an extensive period of time after the body was found. During the lengthy investigation, the case was repeatedly the subject of media attention. The media blitzes were attempts to encourage community participation and to supply the investigators with new information. The Crimestoppers Campaign and the very slogan of the investigation "Someone Out There Knows..." was a request to the community to seriously think about the offence and to carefully consider whether anyone they knew could be responsible. The police conducted 5,541 door-to-door interviews and mailed a flier to 10,000 Edmonton homes to prompt memories and generate tips. These efforts proved successful; citizens made thousands of telephone calls to the special hotline which resulted in 5,113 tips to the police, however the killer remained at large.

The case received unprecedented community support, including a vigilante "justice squad" made up of private citizens searching for clues. Not only did the community participate in the investigation, they also assisted in funding it. Businesses and private citizens contributed over $77,436.00 for a reward fund for information; other rewards included $10,000.00 by The Edmonton Police Commission, a separate $25,000.00 fund for counselling for the family of the deceased, and a Crimestoppers Reward of $2,000.00. The rewards totalled over $114,000.00.

Newspaper articles entitled "Catch the Bastard" and "Donors Eager to Help Catch Corrine's Killer – Thousands of Dollars Flood in for Reward" further illustrate the public sentiment regarding this homicide.

The public's focus on the offence went as far as arguably changing community values. The public outcry included appeals to reinstate the death penalty for sexual offences, including similar statements from Alberta's then Solicitor General, Steve West. Thousands of citizens signed a Petition at 13 Edmonton shopping malls calling for the death penalty to be reinstated and harsher sentences imposed for child molesters, all of this shortly after Corrine's abduction. On the local radio station, K-97, an informal poll on September 9, 1992 reported more than 80% of the 50 callers in favour of a return of the death penalty.

There was a billboard campaign "Someone Out There Knows" with 20 billboard locations throughout Edmonton. Although these billboards were only contracted for 28 days, Hook Advertising reported to the Edmonton Police Service that many of them would remain up longer until the space was otherwise needed. There was substantial advertisement on both bus shelters and busses and two of Edmonton's three major television stations broadcast television specials with respect to the death of this young girl. One of these programs has been running on syndicated re-run networks since 1992. There were no fewer than 309 related newspaper articles published in either The Edmonton Journal or The Edmonton Sun between the years 1992 and 2004.

Clifford Sleigh was arrested in March, 2003 and charged with first degree murder, aggravated sexual assault, and kidnapping. This followed a positive match in the DNA Data Bank. In a clearly admissible statement given to a member of the Edmonton Police Service, he quickly confessed to the kidnapping and of his sexual assault of the deceased, but denied that he killed her. His assertion was that when he left her in the truck yard she was alive. Physical evidence at the scene clearly belied this scenario proffered by Mr. Sleigh. At the time of his arrest, a press conference was called by the City Police and the local media published substantial background

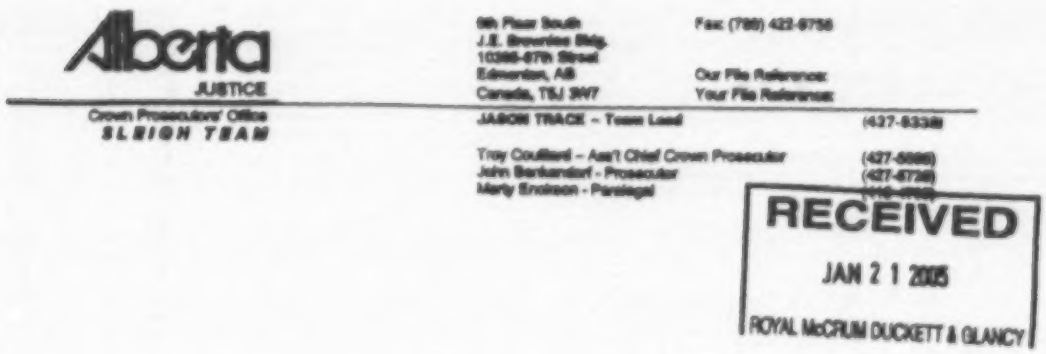
information concerning Mr. Sleigh's previous criminal record including earlier convictions for two very serious sexual assaults involving young female complainants.

When Mr. Sleigh was arrested he was serving an aggregate sentence of approximately 15½ years for these sexual assaults; he had commenced serving that sentence in 1995. All of this "background" was made available through the local public media.

Mr. Sleigh's defence was problematic – lack of intent, difficulties with cause of death, manslaughter rather than murder, or second degree murder rather than first degree murder, were all issues that would be explored at trial. This was not, in our assessment, a case that ought to proceed before a local, or indeed any, Alberta jury. Given that Sleigh was charged with two offences upon which an election in the Provincial Court would be taken at first appearance, namely aggravated sexual assault and kidnapping, it was made very clear on the record and at a relatively early stage in the proceedings, that his election was for trial by judge alone. No "judge shopping" here, see: *R. v. Ng* (2003) 173 C.C.C. (3d) 349 (Alta. C.A.), leave to appeal denied [2004] S.C.A. No. 33. The Crown indicated, however, that they would not consent to this mode of trial, but rather, and pursuant to sections 469(a)(viii), 471 and 473(1) of the *Criminal Code,* the Attorney General exercised his power to mandate trial by jury for an accused charged with certain types of offences including murder. This is a specific example of the Crown's broad power to require a trial by jury under section 568 of the *Criminal Code* for any offences which carry a punishment greater than five years imprisonment. The Crown refused to provide <u>any</u> reason(s) for this decision.

The exercise of Crown discretion in the absence of a demonstrable oblique motive or *mala fides* is not reviewable by the Court. Such decisions are predicated upon the assumption that the Office of Crown Counsel is being exercised objectively and dispassionately. To permit review of prosecutorial discretion, it is said, would interfere with the requirement of a smoothly functioning judicial system, however in this case there were very real concerns that the Crown was motivated by an improper

consideration, that is, the overwhelming desire to convict this man. Concerns about prosecutorial tunnel vision, a spirit of "team building" and a desire to convict were apparent from the very letterhead used to correspond with Defence Counsel in the case as reproduced below.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Marty Knutson - Paralegal

RECEIVED
JAN 21 2005
ROYAL McCRUM DUCKETT & GLANCY

The Crown's decision to withhold their consent to permit re-election was challenged as constituting an infringement of the accused's rights pursuant to sections 11(d), 7 and 11(f) of the *Charter*. An application for declaratory relief was brought seeking to have various sections of the *Criminal Code* declared unconstitutional, or in the alternative, seeking a constitutional exemption in the unusual circumstances of this case. This application was unsuccessful and thus we were faced with the prospect of proceeding to trial in Edmonton before a Court composed of a judge and jury.

A change of venue application was contemplated, however the pre-trial publicity here was Province-wide and we received specific instructions from our client that he did not wish to be tried in any judicial centre other than Edmonton. He had expressed very real concerns with respect to his personal safety, he having been moved from the Bowden Institution to the Discipline and Segregation Unit at the Edmonton Maximum Security Institution immediately upon the charge being brought against him. He had been safely housed there for the in excess of two years that this case spent before the courts.

In resisting the application seeking to have the Crown's refusal to consent to trial by judge alone overridden, Crown Counsel took the position that a properly crafted challenge for cause could go a long way to removing our concerns with respect to finding an Edmonton jury who would be able to fairly and impartially try this case. They said as much in their Respondent's brief. Thus, when the application stood dismissed (although in fact it was abandoned as a result of some evidentiary difficulties we had with our expert evidence) the Crown were hard-pressed to contest a meaningful challenge for cause and to be fair, they did not attempt to do so.

There then followed a series of pre-trial conferences with the assigned Trial Justice, The Honourable Mr. Justice Clackson. During the course of these pre-trial conferences, the challenge for cause was discussed and the Court was provided with a draft of the actual questions that we wished to have posed to the potential jury members pursuant to section 638(1)(b) of the *Criminal Code*. Generally speaking, although the challenge ought to be in writing pursuant to section 639, that was waived in this case given the Crown's concession. Following the pre-trial meetings and the exchange of correspondence between Counsel and the Court, His Lordship decided that 14 questions ought to be put to each potential jury member by the Court itself and we reproduce them below with appropriate commentary:

1. Were you living in Edmonton in 1992?

2. Have you read, heard, or seen anything about this case in the media (newspapers, radio or television), either in 1992 or more recently?

   (loosely based on *Bernardo*)

3. Have you obtained information about it from anywhere else?

   (based on *Bernardo*)

4. As a result of the investigation in 1992, some groups and organizations have circulated petitions or have sought support concerning issues which relate to this case, the victim, or her family. Have you supported any of these groups or associations, for example by signing a petition, writing a letter of support, or by making a donation?

   (based on *Bernardo*)

5. Have you read, heard, or seen anything about the accused's, Clifford Sleigh's background, criminal record, character, or lifestyle?

   (based on *Bernardo*)

6. As a result of any knowledge, discussions, and/or contact with any group or organization, have you formed an opinion about the guilt or innocence of the accused, Clifford Sleigh?

   (based on *Bernardo*)

   - Upon further reflection, I would alter this question to read: "Have you formed an opinion about the guilt or innocence of the accused, Clifford Sleigh?"

7. If you have formed an opinion about the guilt or innocence of the accused, are you able to set aside that opinion and decide this case only on the evidence you hear in the courtroom and the judge's directions on the law?

   (based on *Bernardo*)

   - Often read as: "...and my directions on the law?"

8. Do you believe that Native persons have a greater tendency to lie than persons of other races?

   (based on *R. v. Mankwe* [2001] S.C.J. No. 62 and *R. v. Brunette and Ghostkeeper,* unreported, 2001 challenge for cause process with Smith J., Edmonton Court of Queen's Bench)

9. Do you think of Native Canadian males as prone to drunkenness?

   (created/redrafted by Clackson J.)
   The original version from *Mankwe* and *Brunette and Ghostkeeper* stated: "Do you believe that Native persons have a greater tendency to abuse alcohol than persons of other races?"

10. Do you think of Native Canadian males as prone to violence?

(created/redrafted by Clackson J.)
The original version from *Mankwe* and *Brunette and Ghostkeeper* stated: Do you believe that Native persons are more likely to commit violent crimes than persons of other races in Canada?

There was also an additional question deleted by Clackson J., as he felt sexual abuse fit within the overall scope of violent crime: "Do you believe that Native persons are more likely to commit crimes of a sexual nature, specifically involving sexual abuse of children, than persons of other races in Canada?"

11. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged is Native and the victim Caucasian?

(based on *R. v. Williams* [1998] 1 S.C.R. 1129, concerning an African-Canadian accused)

12. In this case, it is alleged that the accused, a Native man, kidnapped, sexually assaulted and murdered a 6-year old female child. Knowing this about the charges against the accused, do you believe you can set aside any preconceived biases, prejudices or partiality that you may hold and decide this case with a fair and impartial mind?

(loosely based on *R. v. Genereux* [1994] O.J. No. 3095)
Upon further reflection, I would change the "preconceived biases, prejudices or partiality" to read "prejudices".

13. If you have any beliefs about Native persons in relation to violent, sexual or alcohol-related crimes, would you be able to set aside those beliefs and judge the evidence without bias?

(loosely based on *R. v. Genereux)*

14. Is there anything we have asked you that would affect your ability to judge this case fairly and impartially according to the evidence heard at trial and the judge's directions on the law?

(loosely based on *Bernardo)*
Note: this is an open-ended question, which has not been traditionally used in Alberta. Even the question in *Bernardo* was closed-ended, starting with "Answer the following question with a yes or no..."

The Court ordered a publication ban on the hearing until such time as the jury was selected.

Given that the challenge for cause process will always be time-consuming, and in the Sleigh case it took 2½ days, a special panel should be summonsed as the selection obviously cannot take place at the regular Thursday morning jury array. In Sleigh, we had a jury panel of approximately 226 persons summonsed, 14 of whom did not answer the summons, leaving us with a jury panel of 212. Given that we could not anticipate with any precision how long the process would take, it was understood between Counsel that the trial itself would begin with the calling of evidence on the Monday following. As the jury therefore would not be sworn nor have the accused placed in their charge until the following Monday, once the jury selection process was finished on Wednesday afternoon, we selected two alternates as now provided for by section 631(2.1) of the *Criminal Code*. As an aside, local Counsel will know that the only information we are provided with by the Jury Officer with respect to the composition of the panel are the names of the individual panellists and their occupations, if known. We used to be provided with the addresses of each of the jurors, however that is no longer the case. As it turned out in the Sleigh hearing, the very first person called forward answered all of the questions openly and honestly and certainly appeared to be an impartial juror. When asked the last question, however, he said that at the time of the abduction he lived but half a block away from Corrine Gustavson's home – the two triers quickly found him to be unacceptable.

The process of selecting the jury in the Sleigh case proceeded relatively smoothly and was a fascinating exercise. The triers took their responsibilities very seriously and notwithstanding what would appear to be neutral answers to the questions posed, or perhaps even favourable responses to the questions, suggesting therefore that they were impartial, there were several occasions where the triers would find the prospective juror unacceptable. Over the course of 2½ days, 79 persons were called forward and but for the first 2 selected as our initial triers, the balance were each challenged for cause in turn. Of that 77, 29 were found to be unacceptable by the triers,

with the Defence thereafter exercising 19 peremptory challenges and the Crown 6. The balance were found to be exempted by the Trial Judge for various reasons. During the challenge for cause, one of the initial and thus "untried" triers was called forward, found to be acceptable by the triers and by the Defence in the exercise of their peremptory challenge, but was then challenged peremptorily by the Crown (see: *R. v. English, supra*).

Although the selection process itself moved along fairly well, there were two unusual circumstances which arose, the second of which almost led to the derailment of the trial itself.

The first difficulty occurred following the first day of jury selection, when on the next morning, Juror #3, who had sat as Trier #5, and had been responsible for trying 10 of the prospective jurors, 5 of whom had been successfully challenged for cause and 4 of whom had been challenged peremptorily by the Defence thereafter, passed a note to the Jury Officer announcing that someone in her family had had a personal experience with the charge of sexual assault. She indicated however that she still felt confident in all of her answers from the challenge for cause process that she had undergone and she thought that she could still be impartial. The Trial Judge interpreted this note as constituting a request for an exemption. He called the juror back into the courtroom at which time she confirmed that she wished to be excused and the Trial Judge did so without first consulting Counsel. With respect to a charge of first degree murder, both the Crown and Defence have 20 peremptory challenges. We were concerned as to what effect, if any, the exclusion of a juror already impaneled might have on the number of peremptory challenges awarded to either the Defence or the Crown. There were two competing appellate cases directly on point, one from Quebec and one from Ontario.

In *R. v. Cazzetta, Lambert and Poudrier* (2003) 173 C.C.C. (3d) 144 (Que. C.A.), it would appear that three jurors had been replaced pursuant to section 644(1.1) of the *Criminal Code* after the jury was impaneled and perhaps even before they were

sworn, but certainly before any evidence was heard. The issue on appeal was whether or not refusing to grant additional peremptory challenges to the Defence constituted an infringement of the right to a fair jury selection process and the right to make full answer and defence. The Appellants argued that the selection process was irregular as the judge had refused to grant additional peremptory challenges to which, they urged, they were entitled to counter-balance the prejudice created by the discharge of a significant number of jury members. The refusal to "restore the status quo ante" by allowing the extra challenges, infringed their right to a fair jury selection and in turn compromised, they said, their right to make full answer and defence.

The Quebec Court of Appeal ruled that the impanelling of an impartial jury is important in ensuring a right to a fair trial. The increase in peremptory challenges in the case of alternate jurors, provides the court with some analogy to the present situation they said. The Court noted that there was no legislative provision which existed for replacing a discharged juror under section 644(1) or under (1.1). The Trial Judge, in her capacity as the guarantor of the accused's right to a fair and impartial trial, has, they said, the inherent power to palliate the silence of Parliament and to grant both the prosecution and the defence an additional number of peremptory challenges equal to the number of jurors which she has replaced. The Court ruled that section 634(2.1) of the *Code* supports the finding that the Court has this inherent jurisdiction.

The Court decided that the Trial Judge should have awarded the additional peremptory challenges, one for each discharged juror. However, said the Court, in the present case, because the Appellants still had a total of five challenges remaining, and considering at what point the challenges were used in the process in relation to the selection of jurors, the Court concluded there was no unfairness. It should also be noted that in one case the Crown had used one of its own challenges when the Appellants objected but did not wish to use a challenge. The ratio of the case appears to be that where appropriate (that is, where the Defence has used up all of their peremptory challenges) the Trial Judge has the inherent jurisdiction to allow extra

peremptory challenges to compensate for the dismissal of jurors on a one-to-one ratio basis.

This decision is to be contrasted with the decision of the Ontario Court of Appeal in *R. v. Brown; R. v. Walker, supra*. The two accused had been convicted of a variety of offences surrounding an armed bank robbery. A challenge for cause proceeded and on the second day of the jury selection, Juror #2 sent the Judge a note indicating that she suffered from nervous tension and that her doctor felt that her serving on the jury would be injurious to her health. The Trial Judge proposed that she be replaced and that all parties receive an additional peremptory challenge; both counsel objected that there was no statutory authority for so doing and that they must start the jury selection process anew. Crown Counsel stated that the proper course would be to not "restore" the challenge, but that he would not object if one was given back. The Trial Judge noted that there was no prohibition in the *Criminal Code* against restoring peremptory challenges and that it was the fair thing to do. The juror was excused and then two others submitted notes asking also to be excused; one in relation to misinformation about the proposed length of the trial. Defence Counsel moved for a mis-trial and asked that a new panel be summonsed and informed about the expected length of the trial. This was rejected and the two additional jurors were each excused in turn. Crown Counsel objected to additional peremptory challenges being "restored"; the Trial Judge did not restore them and the Defence again moved for a mis-trial. The Crown's position was simple – it was not possible to have more than the maximum number of challenges. The Defence's argument was that there was now no connection between the number of peremptory challenges that they had and the number of jurors to be selected and thus the ability to formulate a jury selection strategy had been destroyed or compromised. They maintained that the jury selection process had become arbitrary. The Trial Judge rejected the mis-trial motion, excused the jurors and moved each up the appropriate number.

The Ontario Court of Appeal judgment goes well-beyond the issue that was raised in Sleigh with respect to the extra-peremptory challenge and discussed

various other procedural matters involved in a challenge for cause and is a case which ought to be closely reviewed. The Court of Appeal found that the awarding of additional peremptory challenges was without jurisdiction. They held that after the first exclusion of a juror, the awarding of an extra-peremptory challenge for the replacement of that juror was an error in law, however, it did not occasion a substantial wrong or miscarriage of justice and thus no appellate remedy was available. They further held that after the second and third jurors were excused, the Trial Judge had not erred in refusing to allow extra-peremptory challenges. The Court expressly rejected the ruling in *R. v. Cazzeta et al, supra*, stating that while there was justification for increasing the number of peremptory challenges when the total number or jurors increases (ie. alternates being selected) whereas when the number of actual jurors never increases when contemplating replacing a sworn juror, that same logic does not apply. Section 634, in granting additional peremptory challenges in the case of alternates, specifies the exceptions to the maximum number of challenges. Had Parliament intended Trial Judges to have such a discretion to create additional exceptions, it could and would have said so. In short, a Trial Judge has no inherent jurisdiction to grant additional peremptory challenges where a juror has been replaced.

Justice Clackson was persuaded that the better view was that of the Ontario Court of Appeal in *Brown* and thus no additional peremptory challenge was permitted for the replacement of this juror. Having said that, however, by the close of the second day, Defence had used 19 of their 20 peremptory challenges and the Court had indicated at the opening of the jury selection process that alternates would be selected pursuant to section 631(2.1) of the *Criminal Code*. We raised the issue of when the two additional peremptory challenges would be permitted, and Crown Counsel conceded that pursuant to section 634(2.1) of the *Criminal Code,* the total number of peremptory challenges, that is 22, would be exercisable by both counsel, notwithstanding that a full panel of 12 had not yet been selected. In other words, the two additional peremptory challenges could be exercised by the Defence at any time during the jury selection process. The law on this issue was not at all clear, but Crown Counsel obviously wanting to avoid any potential argument on appeal, conceded the

point permitting us to exercise our additional peremptory challenges before the full jury of 12 had been selected. Crown Counsel had earlier in the proceedings exercised one of their peremptory challenges out of turn when it was very clear that the two triers had misunderstood or misheard a potential jurors response to one of the questions. Justice Clackson thought that the decision that they rendered, to the effect that the juror was acceptable, could not be revisited notwithstanding that when the juror's answer was replayed on audio tape, it was clear that the two triers had misunderstood the response. We strongly urged Justice Clackson to allow the two triers to revisit their decision, but he would not, and as it was our turn to challenge peremptorily if we chose to do so, we thought that the process would operate unfairly vis-à-vis Mr. Sleigh. Crown Counsel quickly came forward and indicated that in the unusual circumstances they would exercise their peremptory challenge and thus the juror was excused. The Crown wanted a "clean trial"; error free.

The Court found support for the replacement of a discharged juror in *R. v. Parker et al* (1981) 62 C.C.C. (2d) 161 (Ont. H. Ct.).

The second and more troubling issue that arose during the jury selection process came about after the 12 jurors and the 2 alternates had been selected. The case was then adjourned on the Wednesday afternoon to commence the following Monday. Unbeknownst to any of the participants in the process, Juror #12 was under police investigation and indeed subject to immediate arrest during the actual jury selection process. A Detective with the Edmonton Police Service (totally unconnected with the Sleigh matter) was attempting to speak with this individual even after the juror had been selected for the trial, and even after he had so advised the Detective by e-mail. The Detective never bothered to tell the Prosecutor or the Detective in charge of the Sleigh homicide investigation about this matter and, as he subsequently testified during a mis-trial application, he "stewed" about it between his learning that this person was on the jury and the commencement of the trial, with the result that he did not do anything about it until late Monday morning, by which time the trial had commenced and the two alternates had been excused. This led to Juror #12 being dismissed and we

continued with 11 jurors, however the Defence took the position that a mis-trial ought to be declared because of the misconduct of this police officer in not drawing this matter to the appropriate authority's attention, thereby depriving Mr. Sleigh of his right to be tried by 12 rather than by 11 jurors. This mis-trial application was dismissed, the Court following *R. v. Cece and Taylor* (2004) 189 C.C.C. (3d) 294 (Ont. C.A.).

From our observation of the jury selection process, each and every member of the panel who were brought forward as potential jurors, appear to have been fully committed to the process and deeply engaged in the task before them. We were very impressed with the care with which the triers took the responsibility that they faced, and although the process was incredibly repetitive, that is, with respect to the questions as they were posed and the directions given to the individual triers in each and every case by the Trial Judge, the process was engrossing.

We are attaching as Appendix 2 the 7 pages of notes maintained by the Defence during the course of the challenge for cause, along with the local jury officer's memorandum dealing with the process to be employed during a "typical" challenge for cause hearing in Edmonton. Justice Clackson initially indicated that he did not think that two courtrooms ought to be used, however, His Lordship was persuaded that both Courtroom 317, the ceremonial courtroom which is used for jury selection proceedings in Edmonton, and the much smaller adjoining Courtroom 311, ought to be employed and this process proceeded very smoothly. In Courtroom 317, after the jury panel were polled, they were left there and we then moved to Courtroom 311 with the accused and the first two triers who were selected from the jury panel. 20 names were then called forward from those waiting in Courtroom 317 and the challenge for cause then proceeded in Courtroom 311.

We are also attaching to this paper as Appendix 3 the typical sort of instruction given to triers from The Honourable Mr. Justice Watt's, Ontario Specimen Jury Instructions, which was used in this case by Justice Clackson, as well as an outline

of some sample instructions given to the entire panel prior to the challenge for cause process proceeding.

Additionally, and to illustrate perhaps how far we have come, we attach as Appendix 4 the reported decision in *R. v. Lesso and Jackson* (1952) 23 C.R.N.S. 179, which report reproduces the challenge for cause process used in that capital murder case where J. J. Robinette, Q.C. and Arthur E. Maloney appeared for the two accused charged with the murder of a police officer. You will see the process adopted in that case and approved of by Chief Justice McRuer wherein both Robinette and Maloney put the questions to the prospective jurors. There was no suggestion in our case that anyone other than the Trial Judge was the appropriate person to put the questions and this would certainly seem to be the consistent practice across the country today, however note should be taken of *R. v. Dhillon, supra,* in which the two questions permitted by the Trial Judge were posed by Counsel for the accused.

Part IV: Conclusion

It is my firm belief that if defending a member of a visible racial minority and the matter is to proceed before a judge and jury, a challenge for cause ought always be launched. In the *Sleigh* case we received some amazingly candid and apparently honestly held opinions from prospective jurors. I do not think they were attempting to avoid sitting on the case, rather they were simply admitting to a clear and deeply imbedded prejudice vis-à-vis Native people. I hope that the material included in this paper and attached at the various Appendices will assist members who are contemplating a challenge for cause.

In the introduction to this paper, Lord Devlin posed the question of why we have 12 persons sitting on the jury. That may be answered to some extent by G. K. Chesterton in Tremendous Trifles at page 56 where the following appears:

> "Now, it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things; he can even grow accustomed to the sun. And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
>
> Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore, the instinct of Christian civilization has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and coarse faces of the policeman and the professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a play hitherto unvisited.
>
> Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity."

One is also always reminded that juries sometimes will make unpopular decisions vis-à-vis the bench which is not altogether, I suggest, an unhealthy thing. We are reminded of the words of Sir Matthew B. Begbie, later the Chief Justice of British Columbia in *R. v. Gilchrist* (1863), when he said:

> "It is not a pleasant duty for me to have to sentence you only to prison for life; your crime was unmitigated murder, you deserve to be hanged. Had the jury done their duty I might now have the painful satisfaction of condemning you to

> death...you, gentlemen of the jury, permit me to say that it would give me great pleasure to see you hanged, each and every one of you, for bringing in a murderer guilty only of manslaughter."

The jury system however is far from perfect and perhaps I could be permitted one anecdotal reference. In April, 1987 I defended Michael Martineau who was charged with second degree murder. On the second day of the ten day trial, Juror #2 directed a note to the Trial Judge, the late Mr. Justice Cawsey. At that stage of the proceedings we had heard from the Identification Officer and a couple of peripheral witnesses. A copy of the note marked as Exhibit "B" for identification is attached at Appendix 5. After reviewing the note and hearing from Counsel, a City of Edmonton Police Detective (unconnected with the case) was directed by the Court to interview the juror and the Officer reported that there was no reality to the claim being made by him; he was excused; the trial proceeded, and Martineau was eventually acquitted!

Acknowledgement:

I want to acknowledge the considerable assistance provided to me in the Sleigh case by a third year law student, Ms. Richelle Freiheit, who is now articling with the Attorney General's Department in Calgary. She worked with us on the Sleigh case throughout the entire Summer of 2004 and continued to work on the file during her third year of studies at the U of A Law School. She then accompanied me through the trial in May of 2005. A very small measure of the invaluable assistance she provided to us throughout the course of this difficult litigation has found its way into this case study and for her tireless assistance throughout, I am very grateful.

Part V: Table of Cases

1. *R. v. Hubbert* (1975) 31 C.R.N.S. 27 (Ont. C.A.); affirmed by the S.C.C. (1977) 33 C.C.C. (2d) 207n
2. *Sherratt v. The Queen* (1991) 63 C.C.C. (3d) 193 (S.C.C.)
3. *R. v. Parks* (1993) 84 C.C.C. (3d) 353 (leave denied to appeal to the Supreme Court of Canada (1994) 87 C.C.C. (3d)(vi))
4. *R. v. Zundel* (1987) 31 C.C.C. (3d) 97 (Ont. C.A.)
5. *R. v. Keegstra* (No. 2) (1991) 63 C.C.C. (3d) 110 (Alta.C.A.)
6. *R. v. Pheasant* (1995) 47 C.R. (4th) 47 (Ont. C. J.)
7. *Barrow v. The Queen* (1987) 38 C.C.C. (3d) 193
8. *R. v. Geurin and Pimpare* (1984) 13 C.C.C. (3d) 231 (Que. C.A.)
9. *R. v. Betker* (1997) 115 C.C.C. (3d) 421 (Ont. C.A.)
10. *R. v. Cardinal* [2005] ABCA 303
11. *R. v. Barrow* [1987] 2 S.C.R. 694
12. *Find v. The Queen et al* [2001] 154 C.C.C. (3d) 97 (S.C.C.)
13. *R. v. Gladue* (1999) 23 C.R. (5th) 196 (S.C.C.)
14. *Williams v. The Queen* (1998) 124 C.C.C. (3d) 481 (S.C.C.)
15. *R. v. Koh, et al* (1998) 131 C.C.C. (3d) 257 (Ont. C.A.)
16. *R. v. Gayle* (2001) 154 C.C.C. (3d) 221 (Ont. C.A.)
17. *R. v. Wilson* (1996) 107 C.C.C. (3d) 86 (Ont. C.A.)
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19. *R. v. Spence* (2004) 190 C.C.C. (3d) 277 (Ont. C.A.)
20. *R. v. Brown; R. v. Walker* (2005) 194 C.C.C. (3d) 76 (Ont. C.A.)

21. *R. v. Serplus* (1999) 27 C.R. (5th) 306 (Ont. Sup. C.J.)

22. *R. v. Hummel* (2002) 166 C.C.C. (3d) 30 (Y.T. C.A.)

23. *R. v. Clarke* [2003] O.J. No. 3883 (S.Ct.)

24. *R. v. Dhillon* (2001) 158 C.C.C. (3d) 353 (B.C.C.A.)

25. *R. v. Alli* (1996) 110 C.C.C. (3d) 283 (Ont. C.A.)

26. *R. v. English* (1993) 84 C.C.C. (3d) 511 (Nfld. C.A.)

27. *R. v. McLean* (2002) 170 C.C.C. (3d) 330 (Ont. C.A.)

28. *R. v. Patterson* (2003) 174 C.C.C. (3d) 193 (Ont. C.A.)

29. *R. v. Ng* (2003) 173 C.C.C. (3d) 349 (Alta. C.A.), leave to appeal denied [2004] S.C.A. No. 33

30. *R. v. Brunette and Ghostkeeper,* unreported, 2001 challenge for cause process with Smith J., Edmonton Court of Queen's Bench

31. *R. v. Williams* [1998] 1 S.C.R. 1129

32. *R. v. Genereux* [1994] O.J. No. 3095

33. *R. v. Cazzetta, Lambert and Poudrier* (2003) 173 C.C.C. (3d) 144 (Que. C.A.)

34. *R. v. Parker et al* (1981) 62 C.C.C. (2d) 161 (Ont. H. Ct.)

35. *R. v. Cece and Taylor* (2004) 189 C.C.C. (3d) 294 (Ont. C.A.)

36. *R. v. Lesso and Jackson* (1952) 23 C.R.N.S. 179